[redacted]

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

PETITION FOR A WRIT OF [redacted]
To the United States Circuit Court of
For the Fourth Circuit and
BRIEF IN SUPPORT THEREOF.

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THE BAKER LEGAL PUBLICATIONS CO., CLEVELAND, OHIO—[redacted]

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In the Supreme Court of the United States

No. . . . . .

OCTOBER TERM, 1947.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, W. M. MUNDEN,

Petitioners,

vs.

TOM TUNSTALL,
NORFOLK SOUTHERN RAILWAY COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Fourth Circuit.

May it Please the Court:

The petitioners herein are the Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden.

The respondents herein are Tom Tunstall and Norfolk Southern Railway Company.

The petitioners pray that a writ of certiorari issue to review the judgment and decree of the United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled cause, numbered therein No. 5609, affirming the declaratory decree and judgment of the United States District Court for the Eastern District of Virginia at Norfolk.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Fourth Circuit (R. 93....) is reported in .... F. 2d ...., and is also included in the appendix hereto. The opinion of the District Court (R. 25....) is reported in 69 F. Supp. 826.

JURISDICTION.

The opinion and judgment or decree of the Circuit Court of Appeals were entered on August 20, 1947. The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347).

STATEMENT.

This action undertaken by the respondent Tunstall on behalf of himself and all other colored firemen employed by the Norfolk Southern Railway Company, is an attack on an agreement executed on February 18, 1941, between the petitioner, Brotherhood of Locomotive Firemen and Enginemen, and the Southeastern Carriers' Conference Committee representing thirteen southeastern railroads and their subsidiary carriers, including the Norfolk Southern Railway. Also under attack is a supplemental agreement dated May 23, 1941, made with the Norfolk Southern Railway by a local officer representing the firemen's craft employed on that Railway, assuming to interpret certain of the terms of the February 18, 1941, agreement.

The Brotherhood of Locomotive Firemen and Enginemen is a national railway labor organization representing, for the purposes of the Railway Labor Act, the firemen's craft employed on the southeastern railroads. It will be referred to herein as "the Brotherhood."

To comprehend the questions posed for decision by this Court, a brief review of the circumstances giving rise to the February 18, 1941, agreement, and of its operational effect, is essential.

Nonpromotable firemen are those white firemen who are unable, because of physical or mental deficiencies, to pass, or who decline to take, promotion examinations to qualify as engineers, and also all colored firemen. The latter are nonpromotable because of the traditional policy adhered to by all railroads of not placing Negroes in the position of locomotive engineers. The effect of this policy has been the accumulation by nonpromotable firemen of long seniority. For this reason, they frequently occupy substantially all of the upper portion of the firemen's seniority roster and are thus enabled to command the more important and best paid passenger and freight firing assignments. (R. 174, 179)

Promotable firemen, on the other hand, generally occupy the lower portion of the firemen's roster, remaining there until such time as their services are needed as engineers, when they are promoted to the foot of the engineers' seniority roster, provided they are able to satisfactorily pass the promotion examinations. (R. 174..)

The avenue up the firemen's roster to promotion being thus often blocked by nonpromotable firemen, promotable firemen frequently reached the position of engineer with little or no opportunity to operate the locomotives and become familiar with the runs constituting the more important assignments. The effects of this deficiency in experience on the promotable firemen were cumulative. The burden of responsibility borne by the engineer of moving his train safely and on schedule was onerously increased. Owing to the inadequacy of practical experience, the effort at study and preparation required to pass the promotion examinations was measurably increased, and the penalty for failing to pass the tests (generally dismissal from the service) was suffered by the promotable men with greater frequency than would otherwise have been the case. In addition, owing to the fact that promotable firemen spend a substantial portion of their service life on the lower

portions of the firemen's and engineers' rosters, their earnings and working conditions are less favorable than those enjoyed by nonpromotable firemen. (R. 172.)

The grievances thus caused promotable firemen by the presence in substantial numbers of nonpromotable firemen led the Brotherhood, acting through its president, to negotiate the agreement of February 18, 1941, with twelve southeastern carriers and their subsidiaries. The esssential feature of this agreement is its percentage rule, which limits the number of assignments which nonpromotable firemen may hold to a maximum of fifty percent in each class of train service. This rule alleviates to some degree the promotable firemen's grievances, because it enables them to command at least a part of the assignments in each class of service while progressing up the firemen's roster to the point of promotion. (R. 164, 181)

The respondent Tunstall thereupon instituted the present action, predicating his attack upon the grounds that the Brotherhood, by negotiating the percentage agreement of February 18, 1941, had thereby failed and refused to fairly and impartially represent the colored firemen as was its duty under the Railway Labor Act; that it had acted in fraud of the colored firemen's rights in that it was "maliciously intending and contriving to secure a monopoly of employment and the most favored jobs for its own members." (Para. 9, Count II, of Complaint (R. 8...).)

Motions to dismiss predicated upon jurisdictional grounds were filed by the defendants and sustained by the District Court (opinion not reported) and by the Circuit Court of Appeals (140 F. 2d 35). These rulings were reversed by this Court (323 U. S. 210) and the cause remanded to the Circuit Court of Appeals for its decision on questions of service not theretofore resolved. These were ruled on adversely to the defendants (148 F. 2d 403), and the case remanded to the District Court.

Answers were filed on behalf of the defendants, following which requests for admissions were made on the de-

fendants and the deposition of Robert F. Cole, Secretary of the National Mediation Board, was taken at the instance of the plaintiff. A motion for summary judgment was then filed by the plaintiff, followed by similar motions on behalf of the defendants, supported by affidavits of defense.

On October 9, 1946, the District Court sustained plaintiff's motion for summary judgment and denied defendants' motions for summary judgment. The case was continued for hearing on the matter of damages. The question of damages was submitted to a jury on January 21, 1947, and a verdict in the amount of $1,000.00 was returned for the plaintiff against the Brotherhood.

The District Court entered its decree on January 21, 1947, declaring the plaintiff's rights and the Brotherhood's duties in the premises; enjoining the defendants from enforcing the agreements of February 18, 1941, and May 23, 1941, or interfering with the occupation of the colored firemen employed on the defendant Railway, or the enjoyment of their seniority rights as established by the rules and working conditions in effect on the defendant Railway, exclusive of the agreements of February 18, 1941, and May 23, 1941; also judgment for $1,000.00 was entered against the Brotherhood.

The Circuit Court of Appeals affirmed the judgment and decree of the District Court, predicating its decision on two grounds. *First*, it held that the two provisions contained in the May 23, 1941, agreement to the effect that the term "nonpromotable fireman" referred only to colored firemen, and that white firemen then employed would be called to take promotion examinations but if they failed to pass, or declined to take them, their seniority as firemen would not be affected by the percentage rule, established that the purpose and effect of the February 18, 1941, agreement was to eliminate Negro firemen from the service, and it could not, therefore, be a valid agreement within the principles enunciated by this Court in *Steele v. L. & N. R. Co.*, 323 U. S. 192, 202-203.

Second, it held that the agreement of February 18, 1941, was predicated upon conditions created by the discriminatory practice of the carriers in refusing to place Negroes in the position of engineers. This discrimination, in legal effect, permeated the agreement of February 18, 1941, resulting in its invalidity.

The questions presented by this petition are concerned solely with the validity of the terms and conditions constituting the agreement of February 18, 1941.

QUESTIONS PRESENTED.

1. Does the Railway Labor Act or the Constitution preclude the Brotherhood, acting as the representative of the firemen's crafts employed on the southeastern railroads, from negotiating an agreement with these carriers limiting the assignments of nonpromotable firemen to fifty percent of the firing jobs available in each class of service as a means of alleviating the harsh employment conditions experienced by promotable firemen, caused by the presence of large numbers of nonpromotable firemen on the firemen's roster?

2. In view of the fact that the railroads since their inception have consistently declined to allow Negroes to be members of their engineer crafts, and that this rule or practice has created conditions in the firemen's crafts employed on the southeastern railroads which have been the source of serious grievances to the promotable firemen, is the Brotherhood prevented by its responsibilities as a representative under the Railway Labor Act from seeking to moderate these grievances by restricting the assignment rights of nonpromotable firemen?

3. Is a railway labor organization, acting as the bargaining representative of a craft or class under the Railway Labor Act, responsible in damages to members of the craft for losses caused them by an agreement which it negotiated in good faith with the carrier-employer, but

which ultimately is determined by the courts to be a violation of its statutory responsibility to members of the craft?

REASONS FOR GRANTING THE WRIT.

1. The Circuit Court of Appeals has erroneously decided questions of great public importance which materially affect the relationship between large numbers of employees on the southeastern railroads of the country and their employers.

2. The Circuit Court of Appeals has decided a federal question probably in conflict with the decision of this Court in *Steele v. L. & N. R. R. Co.*, 323 U. S. 192, and *Tunstall v. Bro. of L. F. & E.*, 323 U. S. 210.

3. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is included in the appendix, and the citation to the reported opinion of the District Court appears in the petition.

JURISDICTION.

The grounds on which the jurisdiction of this Court is invoked are stated in the petition.

STATEMENT.

A statement of the case has been set forth in the petition and, in the interest of brevity, is not repeated here.

STATUTE INVOLVED.

This case involves the construction of the Railway Labor Act as amended (Act of May 20, 1926, C. 347, 44 Stat. 577; Act of June 21, 1934, C. 691, 48 Stat. 1185; 45 U. S. C. Sec. 151 *et seq.*); and possibly the Fifth Amendment of the Constitution. Pertinent sections of the Act are set forth in the appendix hereto.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the Brotherhood, as the representative of the firemen's crafts on the southeastern railroads, violated its obligation to the nonpromotable firemen when it negotiated the agreement of February 18, 1941, with the Southeastern Carriers' Conference Committee.

2. In holding that the agreement of February 18, 1941, with the Southeastern Carriers' Conference Committee involved discriminations against nonpromotable firemen based upon race, and was for that reason invalid.

3. In failing to hold that the restriction on the right of nonpromotable firemen to bid for assignments established by the agreement of February 18, 1941, with the Southeastern Carriers' Conference Committee was reasonable and justified by the difference in employment conditions experienced by promotable firemen as a class and nonpromotable firemen as a class.

4. In holding that the Brotherhood is liable in damages to the respondent Tunstall.

5. In failing to hold that a nonprofit organization acting as a craft representative under the Railway Labor Act is not liable to members of the craft for losses suffered by them as a result of an agreement made by the organization in good faith with a carrier-employer, which agreement departed from the organization's statutory obligation to represent and protect the interests of all members of the craft.

ARGUMENT.

The argument herein is not addressed to the merits of the case, discussion of the merits being reserved for petitioners' brief in the event the writ is allowed, but is directed to the support of the reasons for granting the writ.

1. The Circuit Court of Appeals has erroneously decided questions of great public importance which materially affect the relationship between large numbers of employees on the southeastern railroads of the country and their employers.

The outcome of this litigation will materially affect the working conditions and employment relationship of virtually all of the enginemen, colored and white, employed by the southeastern railroads.

The presence of substantial numbers of nonpromotable firemen (principally colored firemen) on the rosters of the

southeastern railroads has been the cause of excessive burdens and hardship for the promotable firemen. There were but two methods of alleviating the grievances of the promotable firemen. One method was to divide the available firing assignments between promotable and nonpromotable firemen on a basis that would assure promotable firemen opportunity to progress up the firemen's roster in a relatively normal manner, thereby enabling them to operate the locomotives and become acquainted with the runs in the more important passenger and freight assignments before being advanced to the responsibilities of engineer. This method involved imposing a restriction on the exercise of seniority rights by nonpromotable firemen.

The second method was to place all firemen, white and colored, promotable and nonpromotable, on a basis of complete equality—equality of responsibility and opportunity.

The first method involved the least interference with existing methods and operations. It was adopted in the agreement of February 18, 1941, between the Brotherhood and the southeastern carriers. If the decision of the Circuit Court of Appeals stands, it will have the effect of outlawing this method of alleviating the promotable firemen's grievances. Such a development would necessitate adoption of the second method. Granting equality to nonpromotable firemen will necessitate their taking the progressive examinations; standing for promotion in their regular turn; suffering the penalties normally imposed for failure to pass the progressive and promotion examinations (discharge from the service or demotion to the foot of the seniority roster); and assuming the usual responsibilities of an engineer for the safe and timely delivery of his train and the proper performance by the fireman of his duties. A minority of the nonpromotable firemen now employed may be assumed to be capable of meeting these conditions, but the vast majority are men of long seniority, of advanced years,

with little or no academic training, and are probably incapable of successfully passing the examinations and assuming the supervisory duties of an engineer.

Whichever method is ultimately employed to keep open the avenue of advancement to the top of the firemen's roster, the choice is a matter of vital concern to the enginemen employed on virtually all of the southeastern railroads, and to the public at large. The method employed will be determined by the outcome of this litigation.

2. The Circuit Court of Appeals has decided a federal question probably in conflict with the decisions of this Court in Steele v. L. & N. R. Co., 323 U. S. 192, and Tunstall v. Bro. of L. F. & E., 323 U. S. 210.

This Court, in construing the Railway Labor Act in the *Steele* case with a view to determining the character of agreements which a craft representative may make with a carrier, made the following statement:

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. Cf. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 509-510, 512 and cases cited; *Washington v. Superior Court*, 289 U. S. 361, 366; *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among

members of the craft discriminations not based on such relevant differences." (323 U. S. 192, 203.)

The petitioners contend that the Circuit Court of Appeals failed to weigh the uncontroverted facts of record in the manner required by this Court's statement of the law when determining the validity of the percentage agreement of February 18, 1941.

The judgments of the Courts below are predicated upon respondent Tunstall's motion for summary judgment. Under these circumstances there can be no dispute regarding the essential facts in this controversy. These facts establish beyond peradventure that the working conditions and responsibilities experienced generally by promotable firemen as a class differ materially from those experienced by nonpromotable firemen as a class. These petitioners contend that these differences are "relevant to the authorized purposes" (323 U. S. 192, 203) of the percentage agreement of February 18, 1941, and are consistent with this Court's interpretation of the Railway Labor Act as expounded in the *Steele* case regarding the authority of a craft representative to negotiate collective agreements.

The Circuit Court of Appeals rejected these facts as being without significance. This it did on the grounds that two interpretative provisions incorporated in the agreement executed May 23, 1941, between local representatives of the Norfolk Southern Railway and its firemen's craft "show(s) beyond peradventure" (R.78) that the agreement executed some three months previously (February 18, 1941) between the president of the Brotherhood and the Southeastern Carriers' Conference Committee was bottomed upon race prejudice. (The record does not disclose the origin of these interpretative provisions contained in the May 23, 1941, agreement. No contention will be made in this appeal that the decision of the Circuit Court of Appeals' holding that these provisions are unlawfully discriminatory was improper.)

By attaching a predominant and retrospective significance to the interpretative provisions of the May 23, 1941, agreement, while at the same time rejecting unchallenged facts that amply demonstrate a clear and logical relationship between existing employment conditions and the distinctions recognized between promotable and nonpromotable firemen by the percentage agreement of February 18, 1941, the Circuit Court of Appeals "has decided a federal question in a way probably in conflict with applicable decisions of this Court." Revised Rules of the Supreme Court, Rule 38 (5b).

3. The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The Circuit Court of Appeals, in sustaining the judgment for damages against the Brotherhood, held that it knew of no reason why "an organization which has used its power as bargaining agent in violation of the rights of those for whom it undertakes to bargain, and has thereby inflicted injury upon one of those whom it professes to represent, should not respond in damages for the injury so inflicted."

While the Circuit Court appears to be of the opinion that this question of liability was settled by this Court in the course of its decision in the *Steele* case, these petitioners do not believe that to be the situation.

There was before this Court in the *Steele* case only the plaintiff's complaint. There were no responsive pleadings and no evidence. The complaint charged, in substance, that the Brotherhood had violated its responsibility to the colored firemen by maliciously designing to rob the colored firemen of their jobs and secure them for its own members. (R 99.)

The rule governing responsibility of a craft representative for damages inflicted under the circumstances charged

in the complaint may be entirely different from the applicable rule when the representative's breach of responsibility is the result of a mistake of fact or law.

What this Court said in the *Steele* case regarding the responsibility of a representative for damages has, in petitioners' opinion, no application to the situation depicted by the record in the instant case. Support for this view lies in the fact that while this Court, speaking through the Chief Justice, did say that for a breach of duty by the representative, the Railway Labor Act "contemplates resort to the usual judicial remedies of injunction and award of damages *when appropriate* for breach of that duty" (323 U. S. 192, 207), the question of damages was not made an active issue in the former appeal of this case. It was not included in the issues argued to the Court either in briefs or orally. The Court in its terse treatment of the subject of the craft representative's responsibility for damages, did not conclude that damages may be awarded properly in all cases. It is implicit in the statement that the Act contemplates an award of damages for breach of duty only "when appropriate," that a member of the craft is not entitled to money damages in every instance where a breach of duty has been established.

Although the complaint charges the Brotherhood with malice, fraud and bad faith, the record contains no evidence so characterizing the Brotherhood's conduct. At most, the record discloses an erroneous selection by the Brotherhood of one method of alleviating the grievances of promotable firemen from two available alternatives. The *Steele* opinion, founded as it was upon a complaint similar to that in the *Tunstall* case, and alleging malice, fraud and bad faith, did not decide that damages were recoverable upon the facts here of record. Hence the question remains for determination.

Before the question of damages should be considered settled, a number of relevant factors ought to be weighed in

argument. One, among others, is the non-profit character of all railway labor organizations. Their only source of funds is the contributions of their members. It is illusory to speak of financial responsibility of the organization as such. The rank and file employee becomes the only source of financial responsibility when damages are imposed upon the organization.

Another factor is the absence of any specific rules or standards by which the craft representative may be guided when determining upon a course of action in the performance of its duties as representative. The Railway Labor Act is utterly unavailing for this purpose. This Court acknowledged this situation when it made the following observation in its opinion in the *Steele* case:

> "In both cases the right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right *implied from the statute and the policy which it has adopted.* It is the federal statute which condemns as unlawful the Brotherhood's conduct. 'The extent and nature of the legal consequences of this condemnation, *though left by the statute to judicial determination,* are nevertheless to be derived from it and the federal policy which it has adopted.' " (Italics ours.) (323 U. S. 192, 204.)

Whether a particular agreement, or a proposed change of an earlier agreement, is valid or invalid; what constitutes adequate protection of an employee's interest, and what amounts to inadequate representation—these and similar questions can be answered only by the courts, after the representative has made the best guess of which it is capable as to its rights and responsibilities under the law, and has assumed the risk of later being found to have guessed wrong; this being the alternative to inaction and neglect of the employees' interests which uncertainty of the law tends to induce.

This question of the liability of railway labor organizations for losses caused by their failure to correctly judge

of their duties and responsibilities under the Railway Labor Act, and perhaps also under the Constitution, should be settled by this Court, because the apprehension of the imposition of a harsh rule of damages in the premises will have far-reaching effects on the performance by the employees' representatives of their duties under the Act.

CONCLUSION.

It is respectfully submitted that a writ of certiorari should be issued.

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APPENDIX A.

Pertinent Provisions of the Railway Labor Act.

Sections 1 and 2 of the Railway Labor Act of May 20, 1926, C. 347, 44 Stat. 577, as amended June 21, 1934, C. 691, 48 Stat. 1185, 45 U. S. C. Secs. 151-163.

DEFINITIONS

SECTION 1. When used in this Act and for the purposes of this Act—

First. The term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso.

The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the District Court of the United States for the District of Columbia; and the term "circuit court of appeals" includes the United States Court of Appeals of the District of Columbia.

This Act may be cited as the "Railway Labor Act."

General Purposes

Section 2. The purposes of this Act are:

(1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

General Duties

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to

prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working condi-

tions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such cer-

tification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor

or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

APPENDIX B.

Opinion of United States Circuit Court of Appeals, For the Fourth Circuit.

No. 5609.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, AND OCEAN LODGE NO. 76, AND PORT NORFOLK LODGE NO. 775, AND W. M. MUNDEN, AND NORFOLK SOUTHERN RAILWAY COMPANY,
Appellants,

versus

TOM TUNSTALL,
Appellee.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.

(Decided August 20, 1947.)

Before PARKER, SOPER and DOBIE, Circuit Judges.

PARKER, Circuit Judge:

This is an appeal from the final judgment and decree in a suit by a Negro locomotive fireman employed by the Norfolk Southern Railway Company against that company and the Brotherhood of Locomotive Firemen & Enginemen to obtain a declaratory judgment, injunctive relief and damages. When the case was first before us, we were of opinion that, under recent decisions of the Supreme Court, there was a lack of jurisdiction in the federal courts to entertain it; and we accordingly affirmed a decision dismissing the case for lack of jurisdiction. 140 F. 2d 35. Our decision was reversed by the Supreme Court, and the case was remanded to us to consider jurisdictional questions arising out of service of

process. 323 U. S. 210. We thereupon held that there had been sufficient service of process to bring the defendants before the court and remanded the case to the District Court for further proceedings. 148 F. 2d 403.

When the case came before the District Court on the remand, both parties moved for summary judgment on the pleadings and affidavits filed. On the admitted facts, the Court entered judgment for plaintiff declaring that the defendant Brotherhood was the exclusive representative of the firemen employed by the defendant railway company for the purposes of collective bargaining under the Railway Labor Act; that it was the duty of the brotherhood to represent impartially and without hostile discrimination the plaintiff and the other Negro firemen, constituting a minority group denied membership in the Brotherhood; that the Brotherhood had violated this duty by negotiating with the railway company agreements of February 18, 1941 and May 23, 1941, which discriminated against Negro firemen and resulted in plaintiff's being removed from a run to which he was entitled by seniority; that the agreements were null and void in so far as they deprived plaintiff and other Negro firemen of seniority and employment rights; and that plaintiff had been illegally removed from his run and was entitled to be restored thereto. The defendants were enjoined from giving force or effect to the agreements in so far as they interfered with the occupation of plaintiff or of the class represented by him, and the defendant railway company was directed to restore to plaintiff his seniority rights in the run from which he had been removed as a result of the agreements. The case was reserved for hearing before a jury on the issue of damages, which were duly assessed at the sum of $1,000.00, representing approximately the difference between wages received by plaintiff and wages to which he would have been entitled at the rate prevailing on the run which had been improperly taken from him. The facts are fully stated in

the opinion of the District Judge. See 69 F. Supp. 826. Those which are pertinent may be briefly summarized as follows:

The Brotherhood represents all locomotive firemen employed by the defendant railway company for purposes of collective bargaining under the Railway Labor Act, having been selected as bargaining agent by a majority of the craft. Negro firemen, who constitute a minority of the craft, are not admitted to membership in the Brotherhood, but, nevertheless they must accept it as their bargaining representative, since it is the choice of the majority. Matters of great importance to locomotive firemen in the realm of collective bargaining are seniority rights and the right to promotion to the more highly paid position of locomotive engineer. Upon seniority depends the right to the more desirable runs and upon the right to promotion depends the possibility of advancing to the position of engineer. No railway company of the United States has ever employed a Negro as a locomotive engineer and the Negro firemen are recognized as non-promotable to that position. Other firemen, if they possess the requisite mental and physical qualifications, are given opportunity to stand examinations for promotion to engineer, but not Negro firemen; and, because they are not promoted, Negroes serve for long periods as firemen and the seniority thus acquired enables them to obtain some of the best paid and most desirable runs in the company's service.

The Brotherhood, as bargaining agent for all locomotive firemen in the Southeast, obtained from defendant railway and other Southeastern carriers, over their protest, contracts which had the effect of denying to a large number of Negro firemen desirable runs to which they were entitled by seniority and of giving these runs to white firemen. The Brotherhood accomplished this by contracts distinguishing between promotable and non-

promotable firemen. On March 28, 1940, it made a demand on the defendant railway company and other Southeastern carriers to modify existing working agreements so that only "promotable" men would be employed as firemen. The carriers refused to agree to this, saying:

> "As we understand this proposal, it is that the carriers parties to the conference obligate themselves that they will in future hire no non-promotable men. The effect of this would be to exclude from employment in our service perhaps a small number of white persons who, because of educational qualifications or physical handicaps, might not be promotable, and, in addition, would exclude from employment all colored persons, because, upon the properties represented by this committee, colored employees are not promotable to position of engineer. In our conference we endeavored to point out to you that we doubted the wisdom and fairness of making any such agreement as this, first, because it would restrict the field from which we might draw employees in the event of a labor shortage, and, second, because we did not feel that such a large proportion of the population of the territory which we serve should be completely banned from employment as firemen upon our properties. As we said to you, these people are citizens of the country; it is necessary that they make a living; colored people are patrons of the railroads, and, in our opinion, we should not by agreement entirely exclude them from employment in positions which they have occupied and filled over the years."

Notwithstanding this protest of the railroads, the Brotherhood insisted upon its position, contending that it was in the interest of efficiency in the operation of the railroads that experience as firemen be acquired by men who could be advanced to the more responsible position of engineer, and that it was not fair to recently promoted engineers, to require that when they had to serve as firemen, as they frequently did, they take the less desirable runs. The Brotherhood finally succeeded, on February

18, 1941, in obtaining a modification of existing agreements to provide that the proportion of non-promotable firemen should not exceed fifty per cent in each class of service established as such on each individual carrier and that, until such percentage was reached on any seniority district, only promotable men should be hired and all new runs and vacancies should be filled by promotable men. As a result of this last provision plaintiff was denied a desirable passenger run to which he was entitled by seniority.

That the purpose as well as the effect of this provision was to eliminate Negro firemen from the railroad service, and not merely to eliminate all who were non-promotable in the interest of greater efficiency in the service, is shown by the modification of the agreement made on May 23, 1941, which provides:

> "It is understood and agreed that the phrase 'non-promotable fireman' carried in paragraph 1 of the above quoted agreement *refers only to colored firemen.*
>
> "It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1 and May 15, 1942. *In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected.*" (Italics supplied.)

In other words, only a colored fireman, not a non-promotable white fireman, would be barred from employment because fifty per cent of the employees in that class of the service were non-promotable. Furthermore, white firemen could fail to pass examinations or refuse to take examination without affecting their seniority, and thus put themselves in position to take the positions from which the Negro firemen were excluded because "non-promotable."

On these facts we think that plaintiff was clearly entitled to the judgment entered. There was, unquestionably, discrimination by the bargaining agent based on race which falls squarely within the condemnation of the rule laid down by the Supreme Court in *Steele v. L. & N. R. Co.*, 323 U. S. 192, 202-203, where the Court said:

> "We think that the Railway Labor Act imposes upon the statutory representative of a craft at least as exacting a duty to protect equally the interests of the members of the craft as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates. Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents, cf. *J. I. Case Co. v. Labor Board, supra,* 335, but it has also imposed on the representative a corresponding duty. We hold that the language of the Act to which we have referred, read in the light of the purposes of the act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."

It is argued that the discrimination of the contract obtained by the Brotherhood was not based on race, but on "promotability" of firemen, which was a matter having direct relation to the good of the service as to which the Brotherhood could exercise its discretion without being called to account. The answer is that the modification of May 23rd quoted above, shows beyond peradventure that considerations of race were at the basis of the action taken, else why should non-promotable firemen be defined as colored firemen, and why should white firemen who failed to put themselves in line for promotion be protected in their seniority rights?

And quite apart from the purpose to discriminate shown by the quoted provision of the agreement of May

23rd, it is clear that a bargaining agent which denies membership to Negro members of a craft which it represents cannot justify in law or in reason the use of its power to force a contract from its employer, the effect of which is to discriminate against the Negro minority which it represents. The effect of racial discrimination is not avoided by basing it ostensibly on some other factor. In *City of Richmond v. Deans*, 4 Cir. 37 F. 2d 712, we held that a zoning ordinance which in effect discriminated on grounds of race would not be upheld merely because it was based on the legal prohibition of intermarriage, which was itself based on racial grounds. So here discrimination against Negro employees cannot be sustained merely because it purports to be based on promotability, which is itself based on race.

The fact that the railroads have discriminated against Negroes in the matter of promotability, does not justify the Brotherhood, which represents them as bargaining agent, in making a further discrimination based on that discrimination. Because the railroads do not permit Negroes to hold the position of engineer, is no reason why a bargaining agent representing them should use its bargaining power to deprive them of desirable positions as firemen which the railroads do permit them to hold. This seems so elementary as not to permit of argument. Such action by a bargaining representative clearly violates the rule laid down by the Supreme Court in the *Steele* case, *supra,* as to what is permissible in collective bargaining. The Court said:

> "This does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the terms of the contract based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied, such as differences in seniority, the type of work performed, the competence and skill with which it is performed, are within the

scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit. Cf. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 509-510, 512 and cases cited; *Washington v. Superior Court*, 289 U. S. 361, 366; *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 583. Without attempting to mark the allowable limits of differences in the terms of contracts based on differences of conditions to which they apply, it is enough for present purposes to say that the statutory power to represent a craft and to make contracts as to wages, hours and working conditions does not include the authority to make among members of the craft discriminations not based on such relevant differences. Here the discriminations based on race alone are obviously irrelevant and invidious. Congress plainly did not undertake to authorize the bargaining representative to make such discriminations. Cf. *Yick Wo. v. Hopkins*, 118 U. S. 356; *Yu Cong Eng v. Trinidad*, 271 U. S. 500; *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Hill v. Texas*, 316 U. S. 400."

It is argued that the Brotherhood may not be held liable for damages because it was given a discretion with respect to bargaining and because it is a non profit organization. No authority is cited to sustain this proposition, and we know of none. No reason occurs to us why an organization which has used its power as bargaining agent in violation of the rights of those for whom it undertakes to bargain, and has thereby inflicted injury upon one of those whom it professes to represent, should not respond in damages for the injury so inflicted. If liability were thought to be a subject of doubt in such case, we might find helpful analogy in the cases which hold to accountability an agent who has violated the duty which he owes those for whom he acts or in the cases which establish liability for interference with contract. It is not necessary, however, to go to these, as the Supreme Court in the *Steele* case, *supra*, has definitely ruled that such liability exists. See 323 U. S. at 207.

Affirmed.

FILE COPY

In the Supreme Court of the United States

No. 404.

OCTOBER TERM, 1947.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
OCEAN LODGE NO. 76, PORT NORFOLK LODGE NO. 775, W. M. MUNDEN,
Petitioners,

vs.

TOM TUNSTALL,
NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

PETITIONERS' REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

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CITATIONS.

In the Supreme Court of the United States

No. 404.

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
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PETITIONERS' REPLY TO RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI.

May it Please the Court:

Petitioners desire this Court to review a decision by the Circuit Court of Appeals for the Fourth Circuit, that it may thereby ultimately and conclusively resolve a federal question of great public importance which has been in litigation for more than five years and is being made the subject of a tide of litigation following in the wake of the instant case. The Seaboard Air Line Railroad Company has entered appearance as *amicus curiae* to urge issuance of the writ, primarily on the grounds that the decree entered by the District Court is impracticable in form and inconsistent with the duties enjoined upon the railroads and the Brotherhood by the Railway Labor Act.

The respondent Tunstall opposes the granting of the writ by asserting that—

"—Questions One and Two presented by Petitioners (whether the Railway Labor Act prevents the Brotherhood from alleviating the employment conditions of the promotable firemen caused by the presence of large numbers of non-promotable firemen, by restricting the assignment rights of non-promotable firemen) are irrelevant." (p. 11, respondent's brief.)

To say that the questions presented by the petition for a writ of certiorari are "irrelevant," is gross unrealism. It is a deliberate glossing of the issues basic in this litigation, or it represents a failure by respondent to grasp the consequences inherent in the destruction of the February 18, 1941, agreement and the plan it embraces.

The issue before this Court when it rendered its original decisions in the *Steele* and *Tunstall* cases was made exclusively by the allegations of the complaints. That issue was the Brotherhood versus the Negro firemen. This Court then declared that variations in the contractual treatment of different groups of employees may not be "based on race alone," but that variations in treatment are proper when "based on differences relevant to the authorized purposes of the contract in conditions to which they are to be applied." [1]

Whether there existed in fact variations in the employment conditions of promotable firemen as contrasted with nonpromotable firemen on the southeastern railroads, so as to make proper such variation in treatment of the two groups as is found in the February 18, 1941, agreement, was brought into this case for the first time by the Brotherhood's answer and evidence after the case was remanded to the District Court. The true issue as now revealed by the defense differs vastly from the issue made by the complaint and motion to dismiss in the first instance. *This issue is whether the solution to an operating problem existing on the southeastern railroads, created by the presence of pro-*

---

[1] *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192, 203.

motable and nonpromotable firemen on the same roster shall be accomplished by a division of assignments between promotable and nonpromotable firemen, or must be achieved by the forced promotion of all firemen through the establishment of complete equality of rights and responsibilities for firemen.

The District Court held that the solution of this problem must be achieved by extending promotion rights to all firemen.[2] The Circuit Court of Appeals, in affirming the decree of the District Court, did not disaffirm this conclusion.

If the law developed by this litigation is to be that firing assignments may not be apportioned between the members of the firemen's craft on the basis of promotability, with this classification being determined according to rules and custom long established in the industry, the Brotherhood is reluctant to proceed with the performance of what the Court prescribes to be its positive duty as the representative of the firemen's craft, without an affirmance of this conclusion by the Supreme Court. In promulgating equality of promotion rights for all firemen, it is the judgment of those qualified to hold opinions on the subject that this step will entail loss and misfortune for upwards of perhaps a thousand nonpromotable firemen and their families (R. 163, 180).

The questions of law posed by this litigation, and upon the answers to which the introduction of this innovation in the railway industry hinges, are, we submit, questions of great public importance and may not be fairly characterized as "irrelevant."

---

[2] "The Brotherhood contends it had no part in creating this practice (not promoting negro firemen to engineers) and then proceeds to act upon the assumption that it has no power to change it. *The Court cannot conclude that the bargaining representative has properly discharged its duty to the plaintiff and his class by acting upon such an assumption.*" (Italics ours.) (R. 31.)

A court, to be aware of the implications and consequences involved in ruling upon the validity of the February 18, 1941, agreement, must be alive to the operating background and needs which sired the February 18, 1941, agreement.[3] Exhibits "J" to "R" of the record in this case graphically illustrate the cause of the promotable firemen's grievances which lie at the bottom of this litigation. These Exhibits are reproductions of the firemen's seniority rosters on a number of the seniority districts comprising portions of the southeastern railroads, parties to the February 18, 1941, agreement. Following each fireman's name appears a block proportioned in length to that fireman's relative seniority as a fireman. The block appears as black or white, corresponding to that fireman's classification as a promotable or nonpromotable fireman (R. 178).

The impenetrable barrier presented by the nonpromotable firemen to the normal advancement of the promotable firemen up the roster in preparation for promotion to engineer is apparent by a glance at these Exhibits. The block of nonpromotable firemen at the top of the firemen's roster are as fixtures. They continuously hold the important freight and passenger assignments on their seniority districts, relinquishing them only upon death, retirement or disability (R. 174, 178).

The problem thus created for the promotable firemen has a dual effect. *First,* promotable firemen are prevented from acquiring experience on the locomotives and familiarity with the runs comprising the more important freight and passenger schedules before they are called to assume the responsibilities of engineers (R. 162-163). *Second,* being thus prevented during their careers as firemen from

---

[3] "Particularly when dealing with legal aspects of industrial relations is it important for courts not to isolate legal issues from their workaday context." *Bethlehem Steel Company vs. New York State Labor Rel. Bd.,* 330 U. S. 767, 779.

holding the more important freight and passenger assignments, promotable firemen are forced to accept the lower paid and less desirable assignments during the greater part of their service lives (R. 159-160; 184, 189). Only by reaching senior positions on the engineers' roster can they command assignments comparable in pay and desirability to the assignments generally held by nonpromotable firemen (R. 162).

Added to these discriminations borne by the promotable firemen is the burden of study and training required of them before they can pass the promotion examinations, and the penalty they stand to suffer if they fail in these examinations (R. 161, 175-178, 185). The complexity of these examinations and the high order of technical knowledge and judgment anticipated by them are illustrated by Exhibits "C" to "I" and Exhibits "AA" and "BB." Mute proof that promotion examinations are no formality is provided by the record of experience on one railroad, the Atlantic Coast Line, where sixty-two promotable firemen were discharged from the service between 1939 and 1946 for failure to pass promotion examinations (R. 186-187).

This, in sketch, is the problem facing promotable firemen on the southeastern railroads and calling for a solution. The methods available for solving it are patent. They consist either in removing the block of nonpromotable firemen through forced promotion of all firemen in their regular turn, or of breaking up the block created by the nonpromotables by dividing the available assignments in the several classes of train service between promotable and nonpromotable firemen on a percentage basis.

The latter method was chosen by the contracting parties to the February 18, 1941, agreement as the one least productive of interference with the status quo of individual rights and railroad operations (R. 180-181). If this plan of apportioning assignments is outlawed, then allayment of the promotable firemen's grievance must come through

establishing equality of promotion rights and responsibilities for all firemen. This means that on all seniority districts where nonpromotable firemen occupy the upper portion of the roster, these firemen must promptly prepare for and take promotion examinations.

There are 1,325 colored and white nonpromotable firemen listed on the seniority rosters comprising Exhibits "J" to "R."[4] The great majority of these men, as evidenced by their seniority dates, are in their later years. They are without the educational qualifications essential to understanding and passing the standard promotion examinations. The probability is that a substantial proportion of these men are incapable of meeting the educational and character standards required of engineers, and will perforce suffer the same penalty that promotable firemen have long been subjected to.

The establishment of equal promotion rights for all firemen with the consequences that it promises to hold for so large a segment of railroad employees ought not be put into operation until this Court, as the forum of last resort, has considered the instant case on its merits and reached the conclusion that dividing assignments between promotable and nonpromotable firemen is an unlawful solution of the problem. These petitioners submit that this problem presents a federal question of great public importance deserving decision by this Court.

Respectfully submitted,

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RUSSELL B. DAY,
WILLIAM G. MAUPIN,
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Attorneys for Petitioners.

---

[4] On all of the railroads party to the agreement of February 18, 1941, there are a total of 1,647 employed nonpromotable firemen, constituting approximately twenty-five percent of all firemen listed on the seniority rosters. (R. 67.)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 404

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, OCEAN LODGE, No. 76, PORT NORFOLK LODGE, No. 775, W. M. MUNDEN,
Petitioners,

vs.

TOM TUNSTALL, NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

BRIEF IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI

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October Term, 1947

No. 404

Brotherhood of Locomotive Firemen & Enginemen,
Ocean Lodge, No. 76, Port Norfolk Lodge, No. 775,
W. M. Munden,
Petitioners,

vs.

Tom Tunstall, Norfolk Southern Railway Company,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

There are two briefs to be answered by respondent: first, the brief of petitioner Brotherhood of Locomotive Firemen & Enginemen, and second, the brief of the Seaboard Air Line Railroad Company, *amicus curiae.*

Respondent will deal in Part I with the brief of the Brotherhood, and in Part II with the brief of the Seaboard Air Line Railroad Company as *amicus curiae.*

PART I. OPPOSITION TO BRIEF OF BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

Respondent Tom Tunstall files this brief in opposition to grant of the writ of certiorari sought by the Brotherhood of Locomotive Firemen and Enginemen and shows that the

principles of law governing this case have already been clearly enunciated by this Court on a former hearing;

> See *Steel v. Louisville & Nashville R.R. Co., et al.*, 323 U. S. 192, *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, et al.*, 323 U. S. 210

There is no issue undisposed of for this Court to hear.

This case has been going through the courts for more than five years:

> *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, et al.*, 140 F. (2d) 35 (CCA, 4th); *Same*, 323 U. S. 210; *Same*, 148 F. (2d) 403 (CCA, 4th); *Same*, 69 F. Supp. 826 (Dist. Ct., E. D. Va.)
>
> *Brotherhood of Locomotive Firemen & Enginemen, et al., v. Tunstall*, 163 F. (2d) 289 (CCA, 4th); *Same*, U. S. Sup. Ct., October Term, 1947, No. 404.

It is being prolonged to wear down financially the plaintiff and the class he represents. With over a hundred thousand members the Brotherhood can finance this litigation indefinitely to hold off compliance with the law and with its plain fiduciary duty as bargaining agent under the Railway Labor Act. The litigation should be brought to an end.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Fourth Circuit, is reported in 163 F. (2d) 289 and that of the District Court in 69 F. Supp. 826, as noted above.

JURISDICTION

The jurisdiction of this Court under Section 240a of the Judicial Code as amended by the Act of February 13, 1925 is conceded.

STATEMENT OF FACTS

Petitioner highjumps the basic facts concerning formulation and service of its Notice of March 28, 1940 on the carriers, the method of negotiation of the Agreement of February 18, 1941 and Supplementary Agreement of May 23, 1941. The issue here of misrepresentation of minority workers depends on these facts.

Background

Respondent Tunstall is a Negro locomotive fireman employed on the Norfolk Southern Railway Company (hereinafter called the Norfolk Southern).

By custom railroads in the United States never employ Negroes as locomotive engineers. They draw a large percentage of their engineers by promoting white firemen [1] to engineers, after the white firemen have qualified as engineers through promotional examinations. From this fact universal usage on railroads has designated Negro firemen as "non-promotable," to distinguish them from white firemen who are known as "promotable firemen." All white firemen *ab initio* and until they have failed or waived their promotional examination are known as "promotable firemen." Negroes throughout their service remain "non-promotable firemen" designated as such.

The duties of promotable and non-promotable firemen, *as firemen*, are identical in every respect. The promotional examinations taken by the white firemen have no bearing on their duties as firemen, but are concerned solely *with qualifying the white firemen as an engineer*. Even on railroads which penalize the white fireman who fails his promotional examination three times by dismissal from the service or loss of seniority, the penalty is imposed, *regard-*

[1] A white or Negro fireman serving on a Diesel electric locomotive or on any locomotive using other than steam power is known as a helper. (See R. 14).

less how efficient he might be as a firemen, because he is not good engineer material. Promotion to engineer does not change the fireman's status on the firemen's seniority roster; it merely puts him for the first time on the engineer's seniority roster. Thereafter he is carried on both seniority rosters.

Petitioner Brotherhood of Locomotive Firemen & Enginemen (hereinafter called the Brotherhood) draws its membership from white locomotive firemen and white locomotive engineers. Negroes are barred from membership solely because of color. At all times material the Brotherhood has been and still is the collective bargaining representative under the Railway Labor Act for the entire craft or class of locomotive firemen (including the non-member Negro firemen) on the Norfolk Southern and all the other railroads covered by the Notice of March 28, 1940 (R. 11: Appendix 25). The Negro firemen constitute the minority members of the craft.

Notice of March 28, 1940 (R. 11, Appendix 25)

Without warning to the non-member Negro firemen, with no notice or opportunity afforded them to be heard, the Brotherhood acting as sole bargaining representative under the Railway Labor Act of the entire craft or class of firemen on 21 Southeastern railroads under date of March 28, 1940 served on the railroads a notice to modify existing working agreements covering locomotive firemen as follows:

> "1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.
>
> "2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.
>
> "3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

"4. It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer."

As this was a regional wide movement the Brotherhood requested the carriers to pool together and form a conference committee "to represent them in dealing with this subject." (R. 13). The carriers' conference committee was formed as requested.

No Negro fireman was ever notified the Notice had been served.

Consummation of Agreement February 18, 1941

Whenever it was able, the Brotherhood negotiated an agreement with an acquiescent carrier in the exact terms proposed by the Notice of March 28, 1940 (e.g., Agreement, October 8, 1940, with the Frankfort & Cincinnati Railroad Co., R. 73).

Generally however the carriers refused to accede to the Brotherhood proposals, and on January 15, 1941 the carriers' conference committee rejected the proposals by letter stating in part:

"* * * * *

"With respect to Item 1—that only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power: As we understand this propsal, it is that the Carriers parties to the conference obligate themselves that they will in future hire no nonpromotable men. The effect of this would be to exclude from employment in our service perhaps a small number of white persons who, because of educational qualifications or physical handicaps, might not be promotable, and, in addition, would exclude from employment all colored persons, because, upon the properties represented by this Committee, colored employees are not promotable to position of engineer. In our conference we endeavored to point out

to you that we doubted the wisdom and fairness of making any such agreement as this, first, because it would restrict the field from which we might draw employees in the event of a labor shortage, and second, because we did not feel that such a large proportion of the population of the territory which we serve should be completely banned from employment as firemen upon our properties. As we said to you, these people are citizens of the Country; it is necessary that they make a living; colored people are patrons of the railroads, and, in our opinion, we should not by agreement entirely exclude them from employment in positions which they have occupied and filled over the years.

"With respect to Items 2, 3 and 4 of your letter: We pointed out to you that this proposal would have the effect of severing from our employment men who have rendered faithful and valuable service for many years, would violate established seniority rights, and would doubtless subject the Carriers to a multiplicity of litigation. We feel very strongly, as we told you, that we have neither the moral nor the legal right to agree to Items 2 and 3, and could not favorably consider them.

"For the above considerations, you are advised that your entire proposal is respectfully declined." (R. 42).

Thereupon the Brotherhood invoked the services of the National Mediation Board to assist it in its attempt to drive through its proposal. It accused the Carriers of injecting the race issue into the picture. The Carriers' Committee January 16, 1941 replied: ". . . we say that the race question is obviously inherent in your proposal . . ." (R. 84).

On February 18, 1941 the Brotherhood with the assistance of the National Mediation Board obtained the compromise agreement which respondent Tunstall attacks. This Agreement known as the Southeastern Carriers Conference Agreement, provides among other things:

"(1) On each railroad party hereto the proportion of non-promotable firemen and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction the employ-

ment of non-promotable men on any seniority district on which non-promotable men are not now employed.

"(2) The above percentage shall be reached as follows:

"(a) Until such percentage is reached on any seniority district only promotable men will be hired.

"(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

"* * * * *

"(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

"* * * * *

"(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers." (R. 13).

Neither respondent nor any Negro fireman was given any notice, opportunity to be heard, or any report concerning the negotiations, the invocation of the services of the National Mediation Board, the consummation of the Agreement or its terms.

Supplementary Agreement of May 23, 1941

Thereafter the Brotherhood as bargaining representative under the Railway Labor Act for the entire craft of firemen on the Norfolk Southern, on May 23, 1941 negotiated a supplementary agreement interpreting the main Agreement

of February 18, 1941. This supplementary agreement among other things provided:

> "* * * * *
>
> "It is understood and agreed that the phrase '—non-promotable fireman—' carried in paragraph 1 of the above quoted agreement refers only to colored firemen.
>
> "It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1, and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected." (R. 19).

Neither respondent nor any Negro fireman was given any notice or opportunity to be heard in connection with the proposal for or negotiation and consummation of the Supplementary Agreement; nor was its existence reported in any way.

Effect on Tunstall's Job

In June, 1941, respondent, Tunstall, was fireman on a passenger run between Norfolk, Virginia and Marsden, North Carolina, which he held by virtue of his seniority. He worked the run competently and to the satisfaction of his employer, the Norfolk Southern, until about October 10, 1941 when the Brotherhood asserted his assignment violated the terms of the Agreement of February 18, 1941 and Supplementary Agreement of May 23, 1941 and caused him to be replaced with a Brotherhood member with less seniority than his. Tunstall was forced to accept less desirable work and longer hours on a yard freight job. It was not until he was removed from his assignment that Tunstall had any knowledge of the Agreement or Supplementary Agreement above, and then the advice came from the carrier.

Upon learning of the Agreements Tunstall requested the Norfolk Southern to restore him to his run and seniority rights but the Norfolk Southern referred him to the craft's representative, the Brotherhood. Thereupon Tunstall requested the Brotherhood to represent him and to restore him to his run and seniority rights but his request was ignored. He then filed his action for injunction, declaratory judgment and damages.

Course of the Litigation

As an opener defendants all filed motions to dismiss Tunstall's complaint. The District Court ruled it had jurisdiction over the persons of the defendants but no jurisdiction over the subject matter, and dismissed the complaint. The Circuit Court of Appeals, Fourth Circuit, affirmed on the ground of no jurisdiction over the subject matter, but did not dispose of the question of personal jurisdiction (140 F. 2d 35). On certiorari, this Court reversed, holding there was Federal jurisdiction and remanded the case to the Circuit Court of Appeals for further consideration of the question of jurisdiction over the persons of the defendants (323 U. S. 210). The Circuit Court of Appeals affirmed the judgment of the District Court that it had acquired jurisdiction over the persons of the defendants, and remanded the case to the District Court for further proceedings (148 F. 2d 403).

After taking the deposition of the Secretary of the National Mediation Board, and obtaining certain admissions from each defendant, respondent Tunstall moved for summary judgment. Defendant Brotherhood filed certain affidavits and exhibits; then both the Brotherhood and the Norfolk Southern moved for summary judgment. The District Court gave judgment for Tunstall as set forth on pages 33 to 35 of the Transcript of Record herein and continued the case for assessment of damages, which were assessed by a jury at $1,000.00. (R. 36).

No material facts are in dispute. The Brotherhood does not deny it bars Negroes from membership because of color; does not deny the Notice of March 28, 1940, the negotiations as set forth above resulting in the Agreement of February 18, 1941 and the Supplementary Agreement of May 23, 1941. It admits it gave the Negro firemen no notice, no opportunity to be heard, no report at any stage. It does not deny it forced the Norfolk Southern to remove respondent from his job and replace him with a Brotherhood member holding less seniority than he has.

The judgment of the District Court declared the Brotherhood to be under the duty of representing the non-union or minority union members of the craft without hostile discrimination, fairly, impartially and in good faith; that in serving the Notice of March 28, 1940 and negotiating the Agreements of February 18, 1941 and May 23, 1941, and in compelling the Norfolk Southern to replace Tunstall with a Brotherhood member it violated its duty and reaped an illegal benefit; that the said Agreements are void, do not bind the Negro firemen, and that the Brotherhood and Norfolk Southern are not entitled to take any benefits therefrom, and that Tunstall is entitled to be restored to his job.

The judgment further provides:

> "3. That the defendant Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden and the class they represent, and the defendant Norfolk Southern Railway Company, be and each of them hereby is perpetually enjoined from enforcing or otherwise recognizing the binding effect of said 'Southeastern Carriers Conference Agreement' of February 18, 1941 or the Supplemental Agreement of May 23, 1941 in so far as said Agreement or Supplementary Agreement deprives plaintiff of his assignment on the passenger run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive fireman employed by the defendant Railway or in any way interferes with the occupation

of the class he represents as locomotive fireman employed by the defendant Railway.

"4. That the defendant Norfolk Southern Railway Company be, and it is hereby directed to restore plaintiff to his seniority rights to apply for assignment to the run as locomotive fireman on the passenger run between Norfolk, Virginia, and Marsden, North Carolina from which he was illegally displaced on or about October 10, 1941, in accordance with the rules and working conditions governing locomotive firemen employed by it, irrespective of the alleged operation of said 'Southeastern Carriers Agreement' and Supplemental Agreement, and the position of locomotive fireman on said run is hereby declared vacant if now held by a member of the defendant Brotherhood or other locomotive fireman with less seniority than plaintiff, should plaintiff desire to apply for assignment to said run." (R. 34-35).

Leave was reserved to any party in interest to apply for amendment, modification or enlargement of the judgment after reasonable notice. (R. 35). Neither the Brotherhood nor the Norfolk Southern has made any such application.

On appeal the Circuit Court of Appeals, Fourth Circuit, affirmed (163 F. 2d 289). The Brotherhood now petitions this Court for a writ of certiarari.

QUESTIONS PRESENTED

It is respectfully submitted that Questions One and Two presented by Petitioners (whether the Railway Labor Act prevents the Brotherhood from alleviating the employment conditions of the promotable firemen caused by the presence of large numbers of non-promotable firemen, by restricting the assignment rights of non-promotable firemen) are irrelevant; and that Question 3 (whether the Brotherhood is liable in damages to a fireman aggrieved by its breach of duty as that fireman's collective bargaining agent under the Railway Labor Act) has been answered by this Court in the Steele case (323 U. S. 192) which is a com-

panion case to the Tunstall case, involving the same Brotherhood and the same basic Agreement of February 18, 1941, on another carrer — the Louisville & Nashville Railroad Company.

Respondent Tunstall respectfully submits that there is no question open on this record which has not been disposed of by this Court.

SUMMARY OF ARGUMENT

The argument of alleged hardship on promotable firemen is untenable and irrelevant and is raised at the wrong time and in the wrong forum.

The purpose and intent of the Brotherhood are to be found from its actions, its proposals and methods used to secure adoption of the proposals. It cannot now claim that it never intended to eliminate the non-promotable firemen simply because the carriers refused to submit to the proposal as submitted.

Even if it were true that the presence of a large number of non-promotable firemen makes the working conditions of the promotable firemen burdensome, the Brotherhood in its fiduciary capacity as collective bargaining agent under the Railway Labor Act for the entire craft or class, could not resolve the situation by the elimination of the non-promotable firemen.

The Brotherhood further violated its fiduciary duty by not giving the non-promotable firemen notice and opportunity to be heard.

The Brotherhood is liable in money damages to a non-promotable fireman who has suffered loss as a result of violation of its statutory fiduciary duty as his collective bargaining representative under the Railway Labor Act, as amended.

The judgment is clear, definitive and enforceable.

ARGUMENT

I

The Argument of Alleged Hardship on Promotable Firemen Is Untenable and Irrelevant; Is Raised at the Wrong Time and in the Wrong Forum

The Brotherhood states baldly that the agreements under attack in this litigation represent the Brotherhood's method of eliminating what it considered discrimination against promotable firemen caused by the presence on the southeastern carriers of a number of non-promotable firemen. It argues that because the railroads discriminate against Negroes in the hiring of *engineers* the Brotherhood can use its position as collective bargaining agent under the Railway Labor Act to destroy their rights *as firemen.*

Respondent contends that in the absence of a showing that there is any distinction between the duties of the promotable firemen and non-promotable firemen *as firemen,* the Brotherhood's argument is both irrelevant and untenable, and instead of helping the Brotherhood convicts it of using its position to discriminate against the minority non-member Negro firemen whom it was under a statutory obligation to represent fairly.

Assuming, however, for purposes of argument only that there are distinctions existing within the craft or class of firemen that necessitate special treatment for the problem of the non-promotable firemen, the place and time for thrashing out those issues were by meetings and conferences within the craft before any proposition was made to the carriers, and by providing notice and opportunity to be heard to *all* members of the craft or class. No such procedure was ever carried out by the Brotherhood, and the Brotherhood herein conveniently and purposely has drawn the curtain on all Brotherhood activity leading up to the signing of the Agreement of February 18, 1941, because it can make

no explanation of same consistent with fair and impartial representation or consistent with a lack of bias and prejudice against the Negro firemen. The Brotherhood's first position (and we submit its only true position) was that it owed no duty to the minority members of the craft or class;[2] however, after this Court had held that it was under a statutory obligation to represent *all* members of the craft fairly and impartially it then sought to find some distinction within the craft that would justify its failure to carry out that obligation.

The Railway Labor Act as amended June, 1934, established "unit Representation" of railway employees for the purposes of collective bargaining. The unit established is the "craft or class." There is no sanction in the Act itself nor in the decisions of the Courts that permits a craft representative to split the representation unit into sub-crafts or sub-classes for the benefit of one portion of the craft at the expense of the other portion or for the benefit of another craft. The men who fire steam locomotives for railroads (known as helpers on other than steam power) form a "craft or class" within the meaning of the Railway Labor Act. The duties of all locomotive firemen *as firemen* —white and Negro, promotable and non-promotable — are identical. Rates of pay and working conditions for all firemen performing the same duties within the various classes of service within the craft are the same. Promotional examinations are not required to enhance the efficiency of *firemen* nor to enable firemen to get better jobs *as firemen.* They are required solely for the purpose of determining the eligibility of a fireman to be promoted from that craft into the *craft of engineers.* If a fireman passes the promotional examination he does not improve his position as fireman; he keeps his same relative place on the firemen's seniority roster; his duties as a fireman remain the same, his rate

[2] See Brotherhood's Brief in Opposition to Certiorari, p. 12, *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, et al.,* United States Supreme Court, October Term, 1943, No. 779; Brotherhood's Brief on the merits, *same case,* pp. 27-32, October Term, 1944, No. 37.

of pay and working conditions remain the same as those for all other firemen working in his class of service. When called upon to work as an engineer, however, he leaves the craft of firemen and enters that of engineers and becomes subject to the rates of pay, rules and working conditions governing that craft, except that while working in the engineers' craft he retains his seniority in the fireman's craft and that seniority continues to accumulate in the same manner as though he had never been promoted. If demoted back to firing he re-enters the firemen's craft and takes such firing jobs as his accumulated seniority, *dating from the time he was first hired as a fireman,* entitles him to. The fact that when promoted to the craft of engineers he must enter that craft at the bottom of the engineers' seniority roster and take the less desirable engineer jobs is totally irrelevant on the question of the Brotherhood's obligation to represent all the firemen *as firemen* fairly and impartially. The very fact that the Brotherhood concerned itself with the problem of junior engineers demonstrates that it was not trying to represent the entire craft or class of firemen fairly and impartially but was concerned solely with securing advantages for its members and potential members both as firemen and as engineers by eliminating the minority non-member Negro firemen from the service.

II

The Brotherhood Breached Its Statutory Fiduciary Duty to Respondent Tunstall and the Non-Promotable Firemen by Negotiating the Agreement of February 18, 1941, and the Supplemental Agreement of May 23, 1941; by Refusing to Give Him and Them Notice and an Opportunity to Be Heard, and a Report of Acts Done; and in Displacing Him from His Job by Virtue of Said Agreements in Favor of a Brotherhood Member with Less Seniority Than His.

In spite of the Brotherhood's persistent attempt to divert attention from the basic issue involved in this case, that

issue has always been, and is, whether the record discloses that the Brotherhood violated the statutory fiduciary duty owed by it to respondent and the other Negro locomotive firemen, as sole bargaining representative under the Railway Labor Act of the entire class or craft of locomotive firemen employed by respondent railway.

The Notice of March 28, 1940, was formulated and served upon the carriers involved without any notice whatsoever to the Negro firemen and without giving them any chance to be heard. That notice proposed the elimination of *all* Negro locomotive firemen from the service of the companies involved. The Negro firemen were never advised by the Brotherhood that such proposal had been made.

The Brotherhood never sought the percentage agreement it now argues was its method of alleviating discrimination against the promotable firemen. It had to take the percentage agreement as the best it could get from the reluctant carriers. There can be no question of this fact because where one of the carriers served with the notice acquiesced it signed an agreement in the *identical* terms of the notice. (R. 73).

In using its collective power and position as statutory representative to push through its proposals that resulted in the compromise agreement of February 18, 1941, the Brotherhood did so with full knowledge that the end result would mean the serious disruption of the vested seniority rights of respondent and the other Negro firemen and with further knowledge that the railroad companies considered the Negro firemen competent employees and were opposed to their elimination. (See letter Mackay to Robertson, Jan. 15, 1941, R. 78). Even when, through indirect sources, the Negro locomotive firemen learned of the proposals and negotiations and protested same, the Brotherhood ignored their protests and refused to disclose any of its actions to them. (See letters Jan. 9, and 16, 1941, Houston to Robertson, R. 85-87).

When the Brotherhood found that the best limitation it

could get was a ceiling of fifty per cent on employment of Negroes as firemen it then provided that on any railroad having in *its* opinion rules more favorable to the promotable firemen those rules might be retained in lieu of the provisions of the agreement (R. 14); and further provided that in agreeing to the terms of the agreement of February 18, 1941, the Brotherhood was not to be prejudiced in further negotiating to restrict the employment of firemen, when used as helpers on other than steam power, solely to promotable men. (R. 15, 16).

If the record were to end at this point there would be ample proof of the Brotherhood's violation of its statutory duty within the principles announced by this Court in the Steele and Tunstall cases, *supra*. But the record shows that the Brotherhood's discriminatory action did not stop there. It negotiated with respondent Railway Company the Supplementary Agreement of May 23, 1941, setting forth in Paragraph 8, Example 2, thereof: "It is understood and agreed that the phrase '—non-promotable fireman—' carried in paragraph 1 of the above quoted agreement refers *only to colored firemen.*" (R. 19). [Emphasis supplied].

The Brotherhood would have this Court believe that its motives were pure and that its actions were directed solely towards the alleviating of the promotable firemen's problems. The following provision of the Supplemental Agreement completely disrobes the Brotherhood of this cloak of purity and exposes its real purpose:

> "It is agreed that *promotable* firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination between May 1 and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority *as firemen* shall not be affected." (R. 19). [Emphasis supplied].

What the Brotherhood really was doing was entrenching its position and trying to build up its membership by splitting the craft along color lines and eliminating from the service the Negroes, who under its constitution, were not eligible for membership.

As a result of the above agreements and at the Brotherhood's insistence, respondent Tom Tunstall was removed from his run and forced to accept less desirable and more arduous work in yard service, and the man who took over his job was a white fireman, member of the Brotherhood. When Tunstall requested the Brotherhood to represent him for the purpose of having his seniority and job restored the Brotherhood ignored him and would not so much as answer his letter.

All of the above-mentioned proposals and actions were made and taken by the Brotherhood without notice, opportunity to be heard, or report to the Negro members of the craft that the Brotherhood was charged with the duty of representing fairly and impartially. A clearer case of "irrelevant and invidious" discrimination based on race can scarcely be envisioned.

When this case and its companion case, *Steele* v. *L. & N. Railroad Company, et al.*, were before this Court, this Court held in the Steele Case (323 U. S. at P. 203), "The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making." The cause of action alleged originally in this case stands admitted of record and no question is open which was not disposed on the previous appeal.

III

The Brotherhood Is Liable in Money Damages to a Non-Promotable Fireman Who Has Suffered Loss as a Result of the Violation of Its Statutory Fiduciary Duty to Represent Him Fairly and Impartially Under the Railway Labor Act.

In raising the question of its liability in money damages for violation of its statutory fiduciary duty the Brotherhood shows that it desires power without responsibility. The Steele case (323 U. S. 207) states:

> "We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction *and award of damages* when appropriate for breach of that duty." [Emphasis supplied].

Further argument is superfluous.

IV

The Judgment Is Clear, Definitive and Enforceable

No challenge to the form of the judgment has ever been made in the District Court, the Circuit Court of Appeals or this Court by any party to the record. The first challenge to the sufficiency of the judgment on the ground of certainty and jurisdiction of the court has been imported in the case by the Seaboard's *amicus curiae* brief.

There is nothing wrong with the judgment. The theory upon which respondent Tunstall brought his case was that he accepted the fact the Brotherhood was his bargaining representative under the Railway Labor Act and complained only in the particulars wherein the Brotherhood *mis*represented him. He left the Brotherhood free to make contracts for the benefit of the craft as a whole.

Examining the Southeastern Carriers' Conference Agreement on that basis the pernicious discriminatory parts are distinct and severable from the parts of general benefit to the craft. The Agreement has three main objectives: (1) to curtail the employment and seniority rights of the non-promotable firemen already in service, (2) to provide test examinations for all firemen hired after the agreement went into effect, including a schedule of promotional examinations for promotable firemen thereafter hired, and (3) a schedule of promotional examinations for promotable firemen already in service. (R. 14-16).[3] Respondent attached only the provisions under the first objective. The Supplementary Agreement of May 23, 1941 has for its sole objective a tighter fastening on the Negro firemen of the discriminatory provisions in the Southeastern Carriers' Conference Agreement (R. 16-19). All this is plain and unmistakable from the face of the Agreements themselves.

Therefore when the Court enjoined the Brotherhood and the Norfolk Southern from recognizing or enforcing the Southeastern Carriers' Conference Agreement and the Supplementary Agreement in so far as either interferes with Tunstall's occupation as locomotive fireman or the occupation of the class he represents, all parties: Tunstall, the other Negro firemen, the Brotherhood and the Norfolk Southern knew exactly what the judgment covered. Although the Court in the judgment itself provided that any party could move for amendment, modification or enlargement of the judgment (R. 35), no such motion has ever been made.

The District Court wrote no new term of agreement for the Brotherhood and the Norfolk Southern. It excised the illegal discriminatory provisions. Everything left is the product of collective bargaining negotiations conducted under the Railway Labor Act by the proper representatives of the parties.

[3] The Notice of March 28, 1940 had only one objective—the elimination of Negro firemen in service and a prohibition against employment of any Negroes in the future.

The declaratory phase of the District Court's judgment did nothing more than restate the law as laid down by this Court in the Steele case (323 U. S. at p. 199 et seq.)

Within the limits of the interpretation of the Railway Labor Act by this Court, the District Court has left the parties free and unhampered. It has laid down no chart for future action. The parties know their rights and their limitations; their past conduct has been definitively ruled on. The judgment is enforceable as a matter of almost mechanical administration of the law.

CONCLUSION ON PART I

The Brotherhood has harped upon its professed interest in efficient and safe railroad operation before this Court and other places. The clause in the Supplementary Agreement of May 23, 1941 providing for retention of white firemen who waive or fail the promotional examinations (R. 19) unmasks this pretension. But lest the Court think this might have been a slip on the part of local Brotherhood officers on the Norfolk Southern, respondent calls attention of the Court to the provision of the Southeastern Carriers Conference Agreement itself:

> "All promotable firemen now in the service *physically qualified*, who have not heretofore been called for examination for promotion, or *who have not waived promotion*, shall be called in their turn for promotion. When so called should they decline to take such examination for promotion or fail to pass as herein provided, they shall be dropped from the service." [Emphasis supplied].

It is clear that the Brotherhood's main concern was to eliminate from the service the minority Negro firemen who were ineligible for Brotherhood membership because of race.

Respondent prays that the writ of certiorari be denied.

Part II: Reply to the Brief Amicus Curiae of the Seaboard Airline Railroad Company

The Seaboard Air Line Railroad Company brief *amicus curiae* raises objections to the injunctive relief afforded by the District Court. It argues the jurisdiction of the District Court was limited to directing the Brotherhood as collective bargaining agent

> "to give the notice required, and to proceed in accordance with the machinery of the Act with the negotiation of changes in rules and working conditions that will result in an amended contract containing no differences not relevant to its authorized purposes, within the allowable limits outlined in the opinion of this Court in the *Steele* case, *supra.*" (Brief *amicus* p. 24).

The effect of such a ruling would be to nullify completely the Steele decision which held the Southeastern Carriers Conference Agreement illegal in its discriminatory aspects. The only basis for "renegotiating" the Agreement would be on the theory the Agreement furnished a *valid operating* rule which could be changed only under the procedure of the Railway Labor Act.

Under the collective bargaining procedure of the Railway Labor Act existing agreements remain in effect through the period of notice, the period of negotiation and until a new agreement is reached (45 U. S. C., sec. 152—Seventh). Suppose the Brotherhood and the carriers never reach a new agreement, shall the Southeastern Carriers' Conference Agreement remain indefinitely in effect? That would give the Brotherhood and the carriers power to nullify the Court's decree.

The District Court did not attempt to write a contract for the Norfolk Southern and the Brotherhood. All it did was to excise the illegal portions of a contract already made by the Norfolk Southern and the Brotherhood. It was not

concerned with the promotion problem, or the working conditions of the promotable and non-promotable firemen. It was concerned solely with the abuse of statutory power by the Brotherhood in the manner set forth in its opinion (R. 25).

The Court was careful to do no more than mark out the legal limits of Brotherhood action in the premises. ~~(*Amicus* brief p. 24)~~.

~~This limitation is absurd. By the provision of the Railway Labor Act contracts remain in force during the period of notice and while negotiation is pending. The Brotherhood could stall the negotiations indefinitely. Meanwhile the Agreement which the Courts have declared illegal would remain as an operating rule governing the fireman.~~

The Courts are not running the railroads. Their function is not to instruct the carrier and the employees' representative what to do; but rather to mark out the legal limitations of permissible action under the Railway Labor Act. This was the effect of the decision.

All the other matter about the problems of the promotable firemen which the brief *amicus* attempts to raise, are addressed at the wrong time and to the wrong forum. These questions which were not aired inside the craft before the Brotherhood made its proposals cannot be injected into the litigation at this stage.

Since the District Court has not attempted to do anything except pass on what the bargaining agent has already done, the argument about the white non-promotables not having been heard is irrelevant. They should and will have their notice and opportunity to be heard within the craft before the bargaining agent goes forward, if the judgment of the District Court is upheld. Meanwhile, respondent and

the Negro firemen will have had their wrongs redressed and protection assured against hostile discrimination. As individuals they have the indefeasible right to ask redress for past wrongs.

Missouri ex rel Gaines v. Canada, 305 U. S. 337.

It is respectfully submitted the writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

NOTICE, MARCH 28, 1940 (R. 11)

Brotherhood of Locomotive Firemen and Enginemen

General Grievance Committee

——— Railway

March 28, 1940.

Mr. ————————, ——,——

DEAR SIR:

This is to advise that the employees of the —— Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen, have approved the presentation of request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur or established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen or helpers on other than steam power are those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor Act, kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

The same request is this date being presented on the following railroads:

Atlantic Coast Line
Jacksonville Terminal
Atlanta Joint Terminal
Atlanta & West Point
Western Railroad of Ala.
Central of Georgia
Frankfort & Cincinnati
Georgia Railroad
Georgia & Florida
Gulf, Mobile & Northern
Louisville & Nashville
Memphis Union Station Co.
Louisiana and Arkansas
Mobile and Ohio, Columbus & Greenville
Norfolk and Portsmouth Belt
Norfolk & Southern
Norfolk & Western
Seaboard Airline
Southern Railroad System
St. Louis-San Francisco
Tennessee Central

It is our request that all lines or divisions of railway controlled by the —— Railway shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for the purpose of discussing the proposal. In event settlement is not reached in conference, it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly, (*Signed*) General Chairman.

AGREEMENT, FEBRUARY 18, 1941 (R. 13)

Agreement

Between the Southeastern Carriers' Conference Committee representing the

Atlantic Coast Line Railway Company
Atlanta & West Point Railroad Company and Western Railway of Alabama
Atlanta Joint Terminals
Central of Georgia Railroad Company
Georgia Railroad
Jacksonville Terminal Company
Louisville & Nashville Railroad Company
Norfolk & Portsmouth Belt Line Railroad Company
Norfolk Southern Railroad Company
St. Louis-San Francisco Railway Company
Seaboard Air Line Railway Company
Southern Railway Company (including State University Railroad Company and Northern Alabama Railway Company)
The Cincinnati, New Orleans and Texas Pacific Railway Company
The Alabama Great Southern Railroad Company (including Woodstock and Blacton Railway Company and Belt Railway Company of Chattanooga)
New Orleans and Northeastern Railroad Company
New Orleans Terminal Company
Georgia Southern and Florida Railway Company
St. Johns River Terminal Company
Harriman and Northeastern Railroad Company
Cincinnati, Burnside and Cumberland River Railway Company
Tennessee Central Railway Company

and the

Brotherhood of Locomotive Firemen and Enginemen

(1) On each railroad party hereto the proportion of

non-promotable firemen and helpers on other than steam power, shall not exceed fifty percent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required, in addition showing, in the opinion of the management, reasonable proficiency, to take within stated periods to be fixed by the three years, two examinations to be prepared by management and to be applied to all alike to test

their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examination for promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which

will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Carriers:

Southeastern Carriers' Conference Committee, C. D. Mackay, Chairman, C. D. Mackay, H. A. Benton, C. G. Sibley, Committee Members.

For the Employees:

Brotherhood of Locomotive Firemen and Enginemen, D. B. Robertson, President; Brotherhood of Locomotive Firemen and Enginemen's Committee, W. C. Metcalfe, Chairman.

SUPPLEMENTAL AGREEMENT, MAY 23, 1941 (R. 16)

Supplementary Agreement Effective February 22, 1941, to the Agreement between the Norfolk Southern Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen Dated September 1, 1928

The purpose of this supplementary agreement is to incorporate as a part of the agreement dated September 1, 1928, between the Norfolk Southern Railroad Company and The Brotherhood of Locomotive Firemen and Enginemen the agreement reached in mediation and covered by the National Mediation Board Docket Case No. A-905, which agreement reads as follows:

"(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty percent in each class of service established as such on each individual carrier. This agree-

ment does not sanction on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provision.

(6) All persons hereafter hired as firemen shall be required, in addition to showing, in the opinion of the management, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extend over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to

pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination or promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examination or promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941."

The committee representing the firemen requested that paragraphs 1 to 4 of the Mediation Board agreement quoted above be included as a part of this supplementary agreement as provided for in paragraph 5 of said agreement.

The definition and application of the phrases "—each class of service established as such—" contained in the first sentence of paragraph 1 as that the following constitute the classes of service to which paragraph 1 applied:

Passenger
Local Freight
Through Freight
Work, Ballast and Construction
Yard

The provision of paragraph 2 (b) is understood and agreed to mean that not in excess of 50 percent non-promotable men will be assigned to any class of service on any seniority district.

EXAMPLE 1

In case of only one assignment, in any class of service, on any seniority district, and such assignment is filled by a non-promotable fireman, in the event of the death, dismissal, resignation or disqualification of such non-promotable firemen the assignment would then be filled by a promotable fireman.

EXAMPLE 2

In case of 4 assignments in any class of service on any seniority district filled by one promotable and 3 non-promotable firemen, in the event of the death, dismissal, resignation or disqualification on one of the non-promotable firemen, the assignment would then be filled by a promotable fireman.

It is understood and agreed that the phrase "—non-

promotable fireman—" carried in paragraph 1 of the above quoted agreement refers only to colored firemen.

It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examniation for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1 and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected.

Norfolk Southern Railroad Company. M. S. Hawkins and L. H. Windholz, Receivers, (signed) by J. C. Poe, Assistant to General Superintendent.

Accepted for the Firemen: (signed) G. M. Dodson, General Chairman, Brotherhood of Locomotive Firemen and Enginemen.

Raleigh, N. C., May 23, 1941.

AGREEMENT

BETWEEN THE

FRANKFORT & CINCINNATI RAILROAD COMPANY

and its

LOCOMOTIVE FIREMEN AND HELPERS

Represented by the

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN

Covering rules governing the employment and assignment of Locomotive Firemen and Helpers.

Supplement to your current agreement covering wages and working conditions.
Effective September 1, 1940.

1. Only promotable men will be employed for service as

locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

Duration of this Agreement

The rules and conditions herein, constitute an agreement, and shall remain in effect until changed in accordance with the provisions of the Railway Labor Act, as amended.

FOR THE FRANKFORT AND CINCINNATI RAILROAD CO.

/s/ W. F. Fowler
President.

FOR FIREMEN AND HELPERS

/s/ J. A. Crump
Chairman, Brotherhood of Locomotive Firemen and Enginemen.

Dated: Lexington, Kentucky, October 8, 1940.

FINAL ORDER FOR DECLARATORY JUDGMENT, INJUNCTION AND CONTINUING CAUSE FOR HEARING ON DAMAGES. (R. 33).

[Caption Omitted. See Complaint.]
(Entered January 21, 1947 by Sterling Hutcheson, Judge.)

This action came on to be heard on April 15, 1946

upon motions of all parties for summary judgment and plaintiff's motion to strike certain affidavits and exhibits filed herein, all of which motions were considered and fully argued April 15 and 16, 1946, and submitted to the Court; and the Court not being fully advised as to its judgment took time to consider. The Court now being fully advised as to its judgment, and having filed herein its memorandum opinion,

It is hereby ORDERED, ADJUDGED AND DECREED:

1.-a. That the motion to strike filed by plaintiff be, and it is hereby denied.

-b. That the motions of defendants Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden for summary judgment be, and they are hereby denied.

-c. That the motion of defendant Norfolk Southern Railway Company for summary judgment be, and it is hereby denied.

-d. That the motion of plaintiff for summary judgment in behalf of himself and the class he represents be, and it is hereby granted.

2. That the rights, interests and legal relationships of the parties hereto, the classes they represent, and their privies are settled and declared to be as follows: That plaintiff and the class he represents are members of the craft or class of locomotive firemen employed by the defendant Norfolk Southern Railway Company; that the defendant Brotherhood of Locomotive Firemen & Enginemen is the exclusive representative of the entire craft or class of firemen employed by the defendant Railway for purposes of the National Railway Labor Act, and as such statutory representative is under the duty of representing non-union or minority union members of the craft or class without hostile discrimination, fairly, impartially, and in good faith; that in serving the Notice of March 28, 1940 (Ex-

hibit 1 to the complaint), negotiating the "Southeastern Carriers Conference Agreement," February 18, 1941, and the Supplemental Agreement of May 23, 1941, and in compelling the defendant Railway to remove plaintiff on or about October 10, 1941 from his assignment as locomotive fireman on a passenger run from Norfolk, Virginia, to Marsden, North Carolina under said "Southeastern Carriers Conference Agreement" and Supplemental Agreement, and to replace him with a Brotherhood member, the Brotherhood violated its statutory duties to plaintiff and the class he represents, and reaped a benefit from a contract that it was prohibited from making; that the said "Southeastern Carriers Conference Agreement" and Supplemental Agreement are null and void in so far as they deprive the plaintiff and the class represented by him of seniority and employment rights, that plaintiff and the class he represents are not bound thereby, and the Brotherhood, its members and defendant Railway are not entitled to take any benefits therefrom; that plaintiff was illegally displaced from his run and is entitled to be restored thereto.

3. That the defendant Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden and the class they represent, and the defendant Norfolk Southern Railway Company, be and each of them hereby is perpetually enjoined from enforcing or otherwise recognizing the binding effect of said "Southeastern Carriers Conference Agreement" of February 18, 1941 or the Supplemental Agreement of May 23, 1941 in so far as said Agreement or Supplementary Agreement deprives plaintiff of his assignment on the passenger run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive fireman employed by the defendant Railway or in any way interferes with the occupation of the class he represents as locomotive fireman employed by the defendant Railway.

4. That the defendant Norfolk Southern Railway Company be, and it is hereby directed to restore plaintiff to his seniority rights to apply for assignment to the run as locomotive fireman on the passenger run between Norfolk, Virginia, and Marsden, North Carolina from which he was illegally displaced on or about October 10, 1941, in accordance with the rules and working conditions governing locomotive firemen employed by it, irrespective of the alleged operation of said "Southeastern Carriers Agreement" and Supplemental Agreement, and the position of locomotive fireman on said run is hereby declared vacant if now held by a member of the defendant Brotherhood or other locomotive fireman with less seniority than plaintiff, should plaintiff desire to apply for assignment to said run.

Leave is reserved to any party in interest to apply for amendment, modification or enlargement of this order after reasonable notice.

(s) STERLING HUTCHESON,
United States District Judge.

January 21, 1947.

IN THE

Supreme Court of the United States

No. 404

OCTOBER TERM, 1947

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, OCEAN LODGE No. 76, PORT NORFOLK LODGE No. 775, W. M. MUNDEN,

Petitioners,

vs.

TOM TUNSTALL,

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE

JAMES B. McDONOUGH, JR.
Counsel for Seaboard Air Line Railroad Company.

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IN THE

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Petitioners,

vs.

TOM TUNSTALL,

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondents.

BRIEF OF AMICUS CURIAE

I.

PRELIMINARY STATEMENT

The undersigned, as counsel for Seaboard Air Line Railroad Company (hereinafter called the Seaboard), and associate counsel, respectfully submit the following brief *amicus curiae*. The written consent of all parties to the cause, required by Paragraph 9 of Rule 27 of the Rules of this Court, has been heretofore filed with the Clerk.

This case involves important questions of general public interest with respect to the administration of the Railway Labor Act, as amended, (45 U.S.C. Sec. 151, et seq.), which counsel *amicus curiae* feel should not be overlooked in the exercise of a judicial power intended to protect the rights of a minority. It also involves questions of general law, of which this Court should take cognizance, respecting the scope of the injunctive powers of the District Courts. Consideration of this case as involving only judicial protection against an unlawful discrimination by a bargaining agent accredited under the Railway Labor Act, would be an unfortunate over simplification. In order to settle administrative questions involved, and for the guidance of the several District Courts and the Circuit Courts of Appeals in the respective circuits with respect to the scope of class injunctive relief in these cases (of which others are pending and in which similar injunctive relief is sought), counsel *amicus curiae* respectfully submit that certiorari should be granted.

To the extent that the points raised in this brief may not be assigned as error by the Petitioner herein, counsel respectfully submit that the points so raised show "plain error" which this

Court should notice even though not so assigned or specified (*United Brotherhood* v. *United States*, 330 U.S. 395).

The essence of the decisions of this Court in the *Steele* and *Tunstall* cases (*Steele* v. *Louisville & Nashville R. Co., et al.*, 323 U.S. 192, and *Tunstall* v. *Brotherhood of L.F.&E., et al.*, 323 U.S. 210) was that the administrative machinery created by Congress in the Railway Labor Act for the making of agreements between carriers and their employees respecting rates of pay, rules and working conditions was inadequate to protect the rights of a minority of the craft or class of firemen employed by the two railroads involved in those cases. If that were not so, the individuals involved and the minorities they represented, would have been relegated, at least in the first instance, to the administrative remedies provided by the act. To that extent the holding created a void. How then were the rights of that minority to be protected? This Court answered that question by saying that in such a situation the Railway Labor Act contemplated resort to the usual judicial remedies of injunction and award of damages.

Counsel *amicus curiae* are not suggesting that this Court should reconsider that holding. They make no contention that the Railway Labor Act excluded Tunstall's claims from judicial consideration. They do not question the power of the District Court to grant injunctive relief. The decisions in the *Steele* and *Tunstall* cases, however, left to the District Courts the difficult and delicate task of formulating the precise terms in which the remedy of injunction would be granted. The question which it is felt this Court should consider is whether the character and extent of that relief, with respect to the Negro firemen, as a class, as granted in this action and as prayed in other pending actions of a similar nature, is proper.

Counsel *amicus curiae* are not presenting questions (except indirectly) with respect to the particular relief which has been granted the individual plaintiff. Tunstall is still employed by the Norfolk Southern Railway Company as a locomotive fireman and the judgment of the District Court, in substance, has directed the Railway Company, irrespective of the provisions of its contract, to restore him as a locomotive fireman to a particular passenger run from which he was ousted, and a jury has awarded him damages. Counsel are seriously concerned, however, with the class injunctive provisions of paragraph 3 of the judgment of the District Court (R.34), which are presumably intended to protect the rights of the class Tunstall represented, and this brief is directed only to the consideration of those provisions.

The injunctive provisions of paragraph 3 of the judgment of the District Court, with respect to the class, are void for uncertainty. Labor agreements of the kind here involved are like a child's house of blocks. Remove one block and the whole structure tumbles. In practical effect the class injunction provisions before the Court here have destroyed the structure and given no directions for rebuilding it. As a result the Brotherhood and the Railway Company cannot proceed to rebuild except under jeopardy of punishment for contempt for violating a general injunction to obey the law. The alternatives which the Brotherhood and the railroad must face in any attempt at compliance with such a direction are set out below. If, to the contrary, this Court should hold that this class injunction is valid in form, and should go further and give some indication of the alternative it would consider acceptable, the courts will have made a new labor agreement affecting the rules and working conditions of a large number of men constituting the entire class of locomotive firemen, contrary to the power conferred

upon the courts and to the express provisions of the Railway Labor Act, and, in such a case, they will have made a contract subject to certain of the same defects and vices which this Court condemned in the *Steele* and *Tunstall* cases *supra*. This does not mean that no relief can be granted, but it does mean that orderly and constitutional procedure requires that the class injunction provisions of judgments to be entered by the District Court in this case, and by the District Courts in other similar cases shall be confined within appropriate and workable limits, and shall be consistent with the policy of Congress as expressed in the Railway Labor Act. The importance of these questions is emphasized by the pendency of other similar actions which counsel believe may properly be called to the attention of this Court.

OTHER PENDING ACTIONS

Similar class actions are pending in the District Courts of the United States, brought by Negro firemen employed by other railroads (including the Seaboard) against the Seaboard and other such railroads and against the Brotherhood of Locomotive Firemen and Enginemen (hereinafter called the Brotherhood) as the representative of the craft or class of locomotive firemen employed by such other railroads, and in which like injunctive relief is prayed. One such action is pending against the Seaboard and against the Brotherhood as the representative of Seaboard firemen, in the District Court of the United States for the Eastern District of Virginia, at Norfolk (*Hinton v. Seaboard, et al.*, Civil Action No. 674). Another is pending against the Atlantic Coast Line Railroad Company (hereinafter called the Coast Line) and against the Brotherhood as the representative of Coast Line firemen, in the District Court of the United States for the Eastern District of Virginia, at Richmond (*Rolax v. Coast Line, et al.*, Civil Action No. 670).

The two actions above mentioned are spurious class actions permitted under Rule 23(a)(3) of the Federal Rules of Civil Procedure. A third action has recently (October 27, 1947) been brought in the District Court of the United States for the District of Columbia which purports to have been brought under the suprious class action rule, although there may be a question whether it comes within that rule. In that action (*Graham, et al.*, v. *Southern Railway Company, et al.*, Civil Action No. 4330-47) four Negro firemen employed by Seaboard, sixteen employed by the Coast Line, and one employed by a subsidiary of the Southern Railway Company (hereinafter called the Southern) were joined as plaintiffs, and as defendants were joined the Southern, the Coast Line, the Seaboard, the Brotherhood, certain subordinate lodges and individuals.

The complaint in the *Graham* case alleged the invalidity of the Southeastern Carriers Conference Agreement (which is attached as Exhibit II to the complaint in the *Tunstall* case and is now before this Court (R. 114)) and prayed for a prelimi nary injunction, as well as a permanent injunction. On the motion for a preliminary injunction (which is still *sub judice* in in some respects although a preliminary injunction was denied as to Seaboard and the proceedings stayed as to it) the relief prayed includes a prayer for an injunction restraining all of the defendants "from recognizing or enforcing or complying with the agreement of February 18, 1941", which is the same Southeastern Carriers Conference Agreement before the Court here, and "from taking any action which would have similar discriminatory or unlawful effect as would the enforcement of such agreements or practices". In short, the *Graham* case seeks to raise, in aggravated form, the difficult and complex administrative questions which are involved in the granting of injunctive relief in proceedings of this character.

In the *Graham* case the United States applied for leave to intervene in support of the plaintiffs' motion for a preliminary injunction, and in its points and authorities said:

> "The public interest in the correct interpretation of the federal statute which caused the Government to appear as *amicus curiae* in the Supreme Court extends equally to the observance of the statute as interpreted".

In those points and authorities, however, the Government proceeded upon the same unfortunate over simplification of the situation and gave the Court no help or suggestions with respect to the precise terms in which injunctive relief could, as a practical matter and in conformity with law, be granted.

THE CLASS INJUNCTION PROVISIONS OF THE JUDGMENT OF THE DISTRICT COURT

The opinion of the District Court states that "injunctions will be entered in accordance with the third and fourth paragraphs" of the prayer for relief (R. 32).

Paragraph third prayed that the defendants should be enjoined from enforcing or otherwise recognizing the binding effect of the Southeastern Carriers Conference Agreement* and the supplement to that agreement made separately with the Norfolk Southern Railway Company (hereinafter, when referred to collectively, called the Agreement) "in so far as said agreement and supplement deprives plaintiff of his assignment

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*The Petition for Certiorari herein may be thought to imply that it is the railroads and not the Brotherhood that are at the root of the trouble. In this brief counsel do not wish to distribute blame, but feel it proper to point out, as did the Circuit Court of Appeals, that the railroads opposed the demands of the Brotherhood which resulted in the Southeastern Carriers Conference Agreement.

on the passenger train run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive fireman employed by the defendant Railway Company" (R. 10-11). The quoted part was strictly confined to the plaintiff's individual situation.

Paragraph fourth prayed that the Brotherhood should be perpetually restrained and enjoined from acting or purporting to act as plaintiff's representative or the representative of the other Negro firemen under the Railway Labor Act, "so long as it of they, or any of them, refuse to represent him and them fairly and impartially; and so long as it or they continue to use its position to destroy the rights of plaintiff and the class he represents herein" (R.11). Such class, of course, was only the Negro firemen employed by the Norfolk Southern Railway Company.

The judgement of the District Court dated January 21, 1947, makes the following finding (R.34):

> "That the said 'Southeastern Carriers Conference Agreement' and Supplemental Agreement are null and void in so far as they deprive the plaintiff and the class represented by him of seniority and employment rights."

It is the "in so far as" part, the qualification, that destroys the efficacy of that finding of the District Court.

The class injunctive provisions are contained in paragraph 3 of the judgment of the District Court, which reads as follows (R.34):

> "3. That the defendant Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden and the class they represent, and the defendant Norfolk Southern Railway Company, be and each of them hereby is perpetually

enjoined from enforcing or otherwise recognizing the binding effect of said 'Southeastern Carriers Conference Agreement' of February 18, 1941, or the Supplemental Agreement of May 23, 1941, in so far as said Agreement or Supplementary Agreement deprives plaintiff of his assignment on the passenger run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive fireman employed by the defendant Railway or in any way interferes with the occupation of the class he represents as locomotive fireman employed by the defendant Railway."

Again, it is the qualification that defeats the result intended, "or in any way interferes with the occupation of the class he represents as a locomotive fireman employed by the defendant Railway". The determination of how the agreement and the supplement thereto (hereinafter simply called the Agreement) may be administered so as not to interfere with the occupation of the class of Negro locomotive firemen employed by the Norfolk Southern Railway Company and represented by Tom Tunstall is not a simple matter.

SPECIFICATION OF POINTS

1. The injunctive provisions of paragraph 3 of the judgment of the District Court are void for indefiniteness and generality. The Agreement is not found void *in toto* and no specific act is enjoined nor any specific course of conduct prescribed. The factual situation involved is extremely complicated. The Brotherhood and the railroads cannot be compelled to pick their way at their peril, confronted on the one hand with criminal and civil liability under the Railway Labor Act and on the other hand with punishment for contempt.

New York, N. H. & H. R. Co. v. *Interstate Commerce Commission,* 200 U.S. 361.
National Labor Rel. Bd. v. *Express Pub. Co.* 312 U.S. 426.

2. If the injunctive provisions of paragraph 3 of the judgment of the District Court require (a) the "complete equality" which is mentioned below, or if they require (b) the restoration of the condition existing prior to the Agreement, the injunction constitutes a change in the Agreement which the District Court has no power to make under the provisions of the Railway Labor Act and which is beyond the power of the District Court to make as a matter of general law.

Burke v. *Morphy,* 109 F. (2d) 572, cert. den. 310 U.S. 635.
Hague v. *Committee for Industrial Organization,* 307 U.S. 496.

3. If the District Court, through the injunctive provisions of paragraph 3 of its judgment, has in fact made a new agreement between the parties, its judgment has the same vice condemned by this Court in the *Steele* and *Tunstall* cases, *supra.* As to the Negro firemen, on all roads, the fruit of an equality imposed by the fiat of a court may have the taste of aloes. The District Court, rather than the accredited bargaining agent, will have made a new contract which may have unfavorable effects on some of the members of the craft (white as well as Negro, upon certain railroads other than the Norfolk Southern Railway Company), and there is no showing that such members, as a class, have been heard.

Steele v. *Louisville & Nashville R. Co., et al.,* 323 U.S. 192.
Tunstall v. *Brotherhood of L.F. & E., et al.,* 323 U.S. 210.

4. By virtue of the provisions of the Railway Labor Act respecting the manner in which agreements with employees must be changed, and the reasons for such provisions, the injunctive power of the District Courts in these cases should be limited to requiring the accredited representative of the employees to proceed in accordance with the Act, to give the required notice of a proposed change, and to proceed to negotiate a new agreement in conformity with law, with notice to and an opportunity to be heard on the part of any minority, whether white or Negro. Whether there was compliance with such requirements would be a proper subect of inquiry by the District Courts in enforcing their decrees

Virginian Ry. Co. v. *System Federation No. 40,* 300 U.S. 515.

ARGUMENT

1. *The class injunctive provisions of paragraph 3 of the judgment of the District Court are void for indefiniteness and generality.*

Paragraph 3 of the judgment of the District Court perpetually enjoins the defendants from enforcing or otherwise recognizing the binding effect of the Agreement, insofar as said Agreement "in any way interferes with the occupation of the class he [the plaintiff] represents as locomotive firemen employed by the defendant Railway."

Tunstall represents a class of firemen who have long years of seniority but are not required to take examinations for promotion to the position of engineer. Under the Agreement, and

under the Schedule* as in effect prior thereto, the so-called promotable firemen were and are required to take, within a limited time, comparatively difficult promotional examinations, and if they decline to take them, or fail to pass them, they are dropped from the service (R. 18). Upon being promoted to the position of Engineer, the promotable fireman goes to the foot of the engineers' roster and was and still is required to take any engineer's assignment that may be available, and those assignments are usually less desirable than assignments as firemen at the top of the firemen's roster which he is not permitted to protect as long as there is available to him an engineer's assignment. As a result, the top of the firemen's seniority roster, prior to the Agreement, was composed largely, if not entirely, of Negro firemen who were not compelled to take the promotional examinations and who ran no risk of discharge for failure to take or to pass them, but who took and held all, or substantially all, of the desirable assignments, from which it was the white firemen who were the ones excluded. One effect of the Agreement in substance was to keep the Negro firemen from having all or a majority of the good jobs as firemen and to permit the white firemen to have at least one-half of such jobs, even though there were numerically more white firemen than Negro firemen. In that situation, how can the Brotherhood or a railroad know how to proceed under such an injunction?

Will it remove interference with the occupation of the Negro locomotive firemen if the non-promotable classification is removed? The record contains an affidavit by one John W. Barron, an engineer on the Louisville & Nashville Railroad Com-

*The Agreement, as defined, was in fact only an amendment to the more complete agreement with the firemen covering rates of pay, rules and working conditions, and the complete agreement is referred to herein as the "Schedule".

pany, who became such through promotion from a fireman, and which is submitted as typical of the class he represented (R. 159). His affidavit shows that under the Schedule and the practice of the railroads, engineers are taken from the ranks of firemen; that over a period of four years he took the first year and second year written mechanical examinations required of firemen on that road; that following those examinations he was required to take the written mechanical promotional examination and an operating rules examination, and that after that he took oral examinations covering mechanical subjects and operating practices, which consumed an entire day (R. 161). He stated that in order to prepare for those progressive and promotional examinations he studied consistently during his off hours from work over a period of three years and that (R. 161):

> "All of these examination were very difficult, and one had to possess a very complete and detailed knowledge of all subjects covered by the examination to be able to pass them satisfactorily."

Engineer Barron further stated that he was personally acquainted with all of the firemen on the Montgomery-Mobile Division of the Louisville & Nashville Railroad Company and that (R. 163):

> "I am certain that if the non-promotable firemen now employed on the Montgomery-Mobile Division were forced to prepare themselves and take promotional examinations, the same as the promotable firemen are required to do, the vast majority would be incapable of qualifying as engineers."

The statements of Engineer Barron are supported by statements contained in the affidavit of David B. Robertson, the

President of the Brotherhood, which appears in the record (R. 165). Robertson states that not only are the promotional examinations highly technical and difficult, but that a great amount of time and effort must be invested by firemen over a long period during off hours to be able to successfully pass those examinations and he points out that on the Atlantic Coast Line alone, between 1939 and 1946, a total of 62 firemen (necessarily white firemen) failed in their examinations, either progressive or promotional, and were dismissed from the service (R. 177) and they are listed by name (R. 186).

Robertson further states that at the time of the negotiations resulting in the Southeastern Carriers Conference Agreement consideration was given by the Brotherhood to a proposal that the non-promotable firemen should be required to take those examinations but that, apart from the question whether the Southeastern Carriers would agree to that proposal "it was deemed undesirable and dropped from consideration because of the unanimous opinion of the general chairmen that the vast majority of the non-promotable firemen would be unable to qualify as engineers by sucessfully passing the promotion examinations, and would, as a result, suffer either dismissal from the service or be reduced in seniority standing to the foot of the seniority roster." (R. 180). Displacement to the foot of the firemen's seniority roster is stated to be in practical effect often the same as dismissal (R. 175). On the Norfolk Southern Railway Company the penalty is dismissal (R. 18).

Certainly the Negro firemen cannot be permitted to become engineers upon any less thorough examination than that required of white firemen. By the same token. if the classification of non-promotable is removed, and all discriminations or differences on account of race are to be removed, no good reason

would appear why they should not be compelled to take those examinations. If that is done, instead of not interfering with the occupation of the Negro locomotive firemen the locomotive may become a tumbril and the click of the rails the gride of the Paris cobblestones*.

The record is also clear that on most railroads employing Negro firemen there are numerous white firemen who are classified as non-promotable because they had entered the service prior to the time the taking promotional examinations was made compulsory. Robertson states that in 1941 there were four such on the Central of Georgia, twenty-eight on the Southern, fifty-four on the Louisville & Nashville, and twenty-nine on the Seaboard, a total of one hundred and fifteen on those four roads alone (R. 180). It appears from the definition of non-promotable firemen contained in the Supplementary Agreement here involved (R. 19) that the Norfolk Southern Railway Company has no white non-promotable firemen, but on roads that do have white non-promotable firemen, their status is no more to be overlooked in the effort to do justice and equity than that of the Negro non-promotable firemen.

Will it remove interference with the occupation of the Negro locomotive firemen if, instead of requiring them to take the promotional examinations, the Agreement is simply held void *in toto*, and the situation is restored to what is was prior to the Agreement, and a large number of white firemen are summarily displaced from their present jobs and offered either

*The Schedule Agreements frequently provide that if a fireman should fail on any one examination he will be entitled to a re-examination within a short period and contain the further provision that upon such re-examination a representative of the Brotherhood shall be entitled to be present.

less desirable jobs or no jobs at all? Perhaps so, but what does that do to the occupation of locomotive firemen, as such? Under the law, the railroads are forbidden by unilateral action to change the rates of pay, rules, or working conditions of their employees. (Sec. 2 of the Railway Labor Act).

Will the railroads, if such a course is followed (unless the judgment of the District Court constitutes protection) be subject to the criminal provisions of the Railway Labor Act as well as be subjected to numerous suits for damages by the white locomotive firemen so displaced? On the other hand, if the judgment of the District Court requires the complete equality above mentioned, and the non-promotable white firemen are required to take the promotional examinations, will the railroads, with respect to such non-promotable white firemen, be also subject to the criminal penalties of the Act and to suits for damages by such firemen whether or not they pass the promotional examinations? The rules and working conditions applicable to such white non-promotable firemen will have been changed without their consent. Even if they pass, they will get less desirable jobs. Which alternative should the parties take, or what course should they follow, in the face of the class injunctive provisions of the judgment in this case?

Under the circumstances disclosed by this record, counsel *amicus curiae* respectfully submit that compliance with the command of that judgment, in the form as written, is impossible of attainment, and that the injunctive provisions of paragraph 3 of the judgment of the District Court are void. On that point there are two decisions of this Court which we submit are controlling.

In the case of *National Labor Rel. Bd.* v. *Express Pub. Co.*, 312 U.S. 426, this Court found a cease and desist order of the National Labor Relations Board to be too broad. This Court said that (at page 435) "we can hardly suppose that Congress intended that the Board should make or the Court should enforce orders which could not appropriately be made in judicial proceedings". With respect to orders which could appropriately be made in judicial proceedings this Court said (at page 436):

> "A Federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed."

In the case of *New York, N.H. & H.R. C.* v. *Interstate Commerce Commission*, 200 U.S. 361, at page 404, this Court said:

> "In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the Act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it."

2. *If the injunctive provisions of paragraph 3 of the judgment of the District Court have, in fact, created a new contract, the judgment of the District Court was (a) beyond its power under the Railway Labor Act and (b) invalid as a matter of general law.*

The facts and authorities set out in Point 1 above would seem to be conclusive of the invalidity of the injunction, in the respect there discussed, and this brief could well stop with that point. Counsel *amicus curiae*, however, are more than mere advocates, and the decision on that point alone would leave unsettled other and vexatious questions which should be considered and passed upon by this Court.

The Interstate Commerce Commission, when it takes jurisdiction under Section 3 of the Interstate Commerce Act in cases involving racial discrimination with respect to passengers upon railroad trains, issues its report and order directing specificially the action to be taken or not to be taken by the carrier, and the parties have a guide to their future conduct (*Henderson* v. *Southern Railway*, 258 I.C.C. 413, and *Henderson* v. *United States*, 63 Fed. Supp. 906). Where agreements with the employees of a carrier are involved, however, the order of the District Court can not specify, by restraint or by command, with such particularity, as to do so would constitute the making of a new such agreement.

For the purposes of this Point 2 it makes no difference whether the District Court intended to command that complete equality, mentioned above, or the restoration of the status existing prior to the Agreement, or some other and alternate arrangement. The essential facts are that whatever was intended, a new agreement has been made that affects all firemen, with no steps

whatsoever having been taken to comply with the requirements of paragraphs Sixth and Seventh of Section 2 of the Railway Labor Act. It may be argued that paragraph Sixth was inapplicable, as no "dispute" was involved, but it cannot be denied that paragraph Seventh, by its very terms, is applicable.

Paragraph Seventh reads as follows:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."

The District Court has commanded the Norfolk Southern Railway Company to change the rules and working conditions of its firemen, contrary to the express prohibition of that statute.

The power of a District Court of the United States to make a new or different contract between the carrier and its employees with respect to wages was expressly denied in the case of ***Burke*** v.*Morphy*, 109 F. (2d) 572, *cert. den.* 310 U.S. 635. In that case the Circuit Court of Appeals for the Second Circuit, said:

> "The order did affect wages and was in substance a wage cut; no wage cut may be imposed unless the provisions of the Railway Labor Act, 45 U.S.C.A. § 151 et seq., are first obeyed; and no attempt was made to comply with this Act. The Railway Labor Act (48 Stat. 1185, 45 U.S.C.A. § 151) applies to every interstate carrier, including a carrier that is being operated by a receiver. The Act forbids any intended change in an agreement affecting rates of pay unless thirty days' notice is given to the other party to the agreement. *** A contention that this order did not even 'affect' existing agreements between the carrier and the various brotherhoods is frivolous."

The statute in question there was the same as the one here involved, to-wit: Paragraphs Sixth and Seventh of Section 2 of the Railway Labor Act. Both refer to agreements respecting "rates of pay, rules or working conditions". No reason exists why a District Court of the United States can make a new contract respecting rules or working conditions if it cannot make one with respect to wages. Counsel *amicus curiae* respectfully submit that if the judgment in this case is upheld, the *Burke* case has been overruled, and the Railway Labor Act has been found to have conferred upon the courts of the United States power over the wages, rules and working conditions of the employees of the carriers of this country far in excess of the power of those courts as exercised through injunctive process prior to the passage of the Norris-LaGuardia Act. (29 U.S.C. Sec. 101, et seq.), and a precedent dangerous to the liberties of labor will have been established (cf. *Milk Wagon D. Union* v. *Lake Valley F. Products,* 311 U.S. 91).

As a matter of general law, the District Court had no such power. In the case of *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, where an injunction had been issued finding an ordinance of the City of Jersey City to be void and enjoining the city officials as to the manner in which they should administer the ordinance, the Court said (at page 518):

> "As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners. They [the respondents] are free to hold meetings without a permit and without regard to the terms of the void ordinance. The courts cannot rewrite the ordinance, as the decree, in effect, does."

In this case, the Agreement can not be considered apart from all its provisions, nor apart from the Schedule. If the Agreement

is sought to be retained, with only the non-discriminatory provisions stricken out, a new agreement has in fact been made, even though its exact terms may be uncertain. Whatever they are, or were intended by the Court to be, they constitute a new agreement. By the same token, the District Court in this case would have exceeded its power if it had simply found the Agreement (as was required by this Court in the *Hague* case, *supra*) to be void in its entirety, for there would necessarily have resulted a new agreement. This argument does not defeat itself, nor is it a return to the argument that by reason of the provisions of the Railway Labor Act the claims of the plaintiff were not justiciable for there are well defined limits, as mentioned under Point 4, within which the injunctive power in these situations can lawfully and effectively be applied.

3. *The class injunctive provisions here questioned would, if valid, create a new contract having the same vice condemned by this Court in the Steele and Tunstall cases.*

Tunstall is only one of approximately one thousand Negro firemen employed by the railroads parties to the Southeastern Carriers Conference Agreement. His action is brought as a class action on behalf of only the class of Negro firemen employed by one of such railroads (R. 4), and not on behalf of all Negro firemen. He asked for specific relief for himself, to be restored only as a firemen to one particular and specified passenger run, and to be awarded his individual damages, but with respect to the common question of law and fact he asked general injunctive relief in favor of all constituting his class. Nevertheless, if the judgment of the District Court is permitted to stand in its present form, it will vitally affect all Negro firemen and all the railroads by which they are employed, and all the members on such railroads of the Brotherhood.

Tunstall, one individual, brought and proceeded to judgment with his action under the rule allowing such spurious class suits. No other Negro locomotive fireman, so far as we are advised, joined in his action. That may be argued to indicate acquiescence by the class, but it may as well show lethargy, the timidity of a frequently inarticulate group, or simply lack of understanding, with probably no anticipation whatever of the possible effect of the judgment that would be entered in the proceedings.

Under Rule 23(c) of the Federal Rules of Civil Procedure Tunstall could not have dismissed or compromised his action without the approval of the District Court, and under that rule the District Court was authorized, upon any proposed dismissal or compromise, to require that notice thereof be given to all members of the class in such manner as it might direct. The case proceeded to judgment, rather than a dismissal or a compromise, so that Rule 23(c) was not applicable by its terms, and we intend no criticism of the District Court. The District Court, as a matter of fact, and as we show in Point 2 above, cannot be substituted as the bargaining agent of the employees, but, when it was in practical effect acting as such, the situation was clearly one in which it would have been appropriate for the notice authorized by that rule to have been given. As pointed out in the case of *Burke* v. *Morphy, supra,* with respect to the employees of the Receiver of the Rutland Railroad Company, even assuming their privilege to intervene they were under no obligation to do so and "the existence of the privilege is not equivalent to actual intervention. Unless they exercised their privilege, they remained strangers to the litigation." The employees there were not parties to a class suit but the situation is analogous.

The possible unfavorable effects, upon even the members of the class Tunstall represented, have been pointed out above. As a result of proceeding to judgment as it did, the District Court, rather than the bargaining agent as in the *Steele* and *Tunstall* cases, has made a new contract which may have unfavorable effects on some of the members of the craft (not merely, even, the class of Negro firemen, for non-promotable white firemen on other roads may be unfavorably affected by similar judgments), and there is no showing that they have been given notice and an opportunity to be heard (unless the pendency of the action and the entry of a judgment establish a presumption to that effect), and there is certainly no showing that, as a matter of fact, such other members were heard and their wishes consulted with respect to the form and effect of the judgment.

The result is contrary to the very requirement of this Court that whenever necessary to a fair and impartial representation, the bargaining agent *is required* to consider requests of minority members, "and expressions of their views with respect to collective bargainning with the employer and to give to them notice of and opportunity for hearing upon its proprosed action." *Steele* v. *Louisville & Nashville R.R. Co., et al.*, 323 U.S. 192.

4. *By reason of the provisions of the Railway Labor Act, the injunctive powers of the District Courts, in these cases, should be limited to requiring the bargaining agent to proceed under the machinery of the Act with the negotiation of such changes in rules and working conditions as may be appropriate to remove the claim of discriminatory representation.*

The Railway Labor Act, for reasons which do not require restatement here, prohibits changes in wages, rules and working

conditions except upon compliance with the machinery set forth in the Act.

The District Courts, as pointed out above, should not, and we respectfully submit that they cannot, be constituted the bargaining agent for the employees. The power of the District Courts in these cases should be limited to compelling the bargaining agent to give the notice required, and to proceed in accordance with the machinery of the Act with the negotiation of changes in rules and working conditions that will result in an amended contract containing no differences not relevant to its authorized purposes, within the allowable limits outlined in the opinion of this Court in the *Steel* case, *supra.* For that purpose there can be no question but that the District Courts have ample and effective power, under the decision of this Court in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515.

In that case it was argued that the obligation of the Railway Labor Act requiring the carrier to negotiate with the representative of its employees was not the appropriate subject of a decree in equity and that since equity could not compel the parties to agree it should not compel them to take the preliminary steps which might result in an agreement. The language of this Court, in response to that argument, is particularly appropriate upon this point. This Court said (page 550):

> "There is no want of capacity in the court to direct complete performance of the entire obligation; both the negative duties not to maintain a company union and not to negotiate with any representative of the employees other than respondent *and the affirmative duty to treat with respondent.* * * * *Whether an obligation has been discharged, and whether action taken or omitted is in good faith or reasonable, are everyday subjects of inquiry by courts in framing and enforcing their decrees.*" (Italics supplied).

In concluding its discussion of that point this Court said (553) "The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the court." The same cannot be said of the judgment here under consideration.

CONCLUSION

We respectfully submit that certiorari should be granted in this case and that the decision of the Circuit Court of Appeals should be reversed and the proceedings remanded to the District Court for further proceedings in accordance with the opinion of this Court.

Respectfully submitted,

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